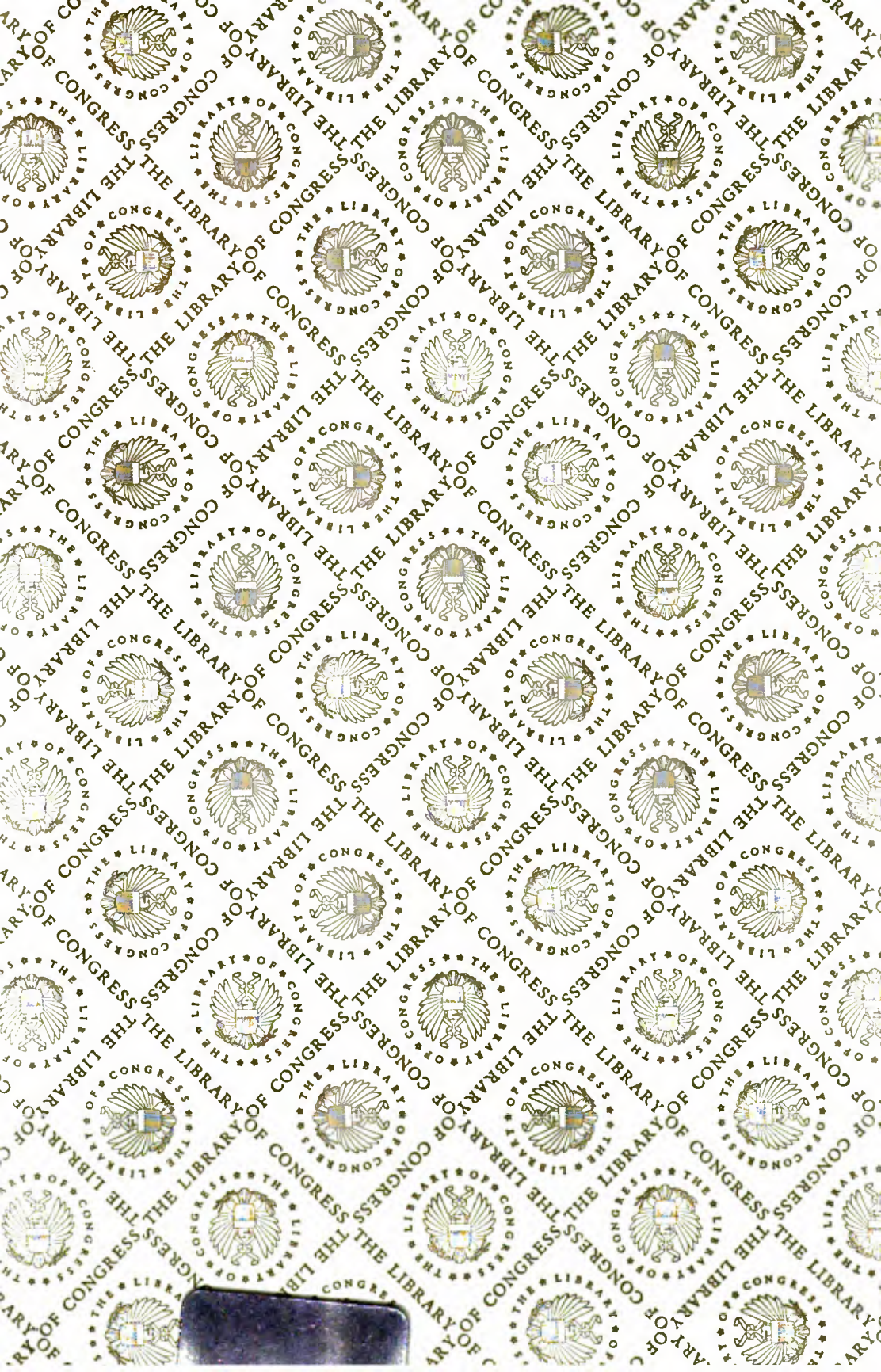
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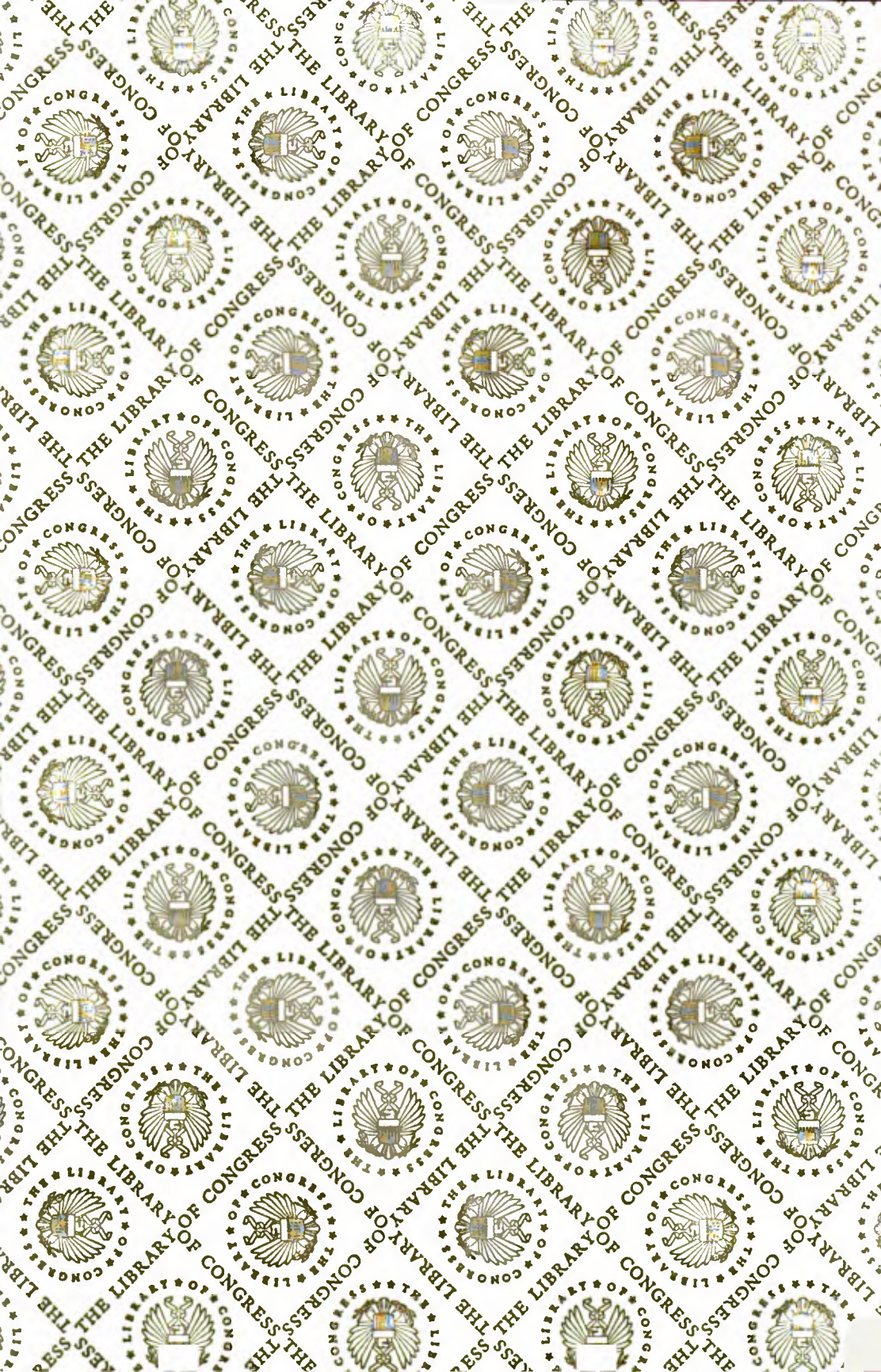
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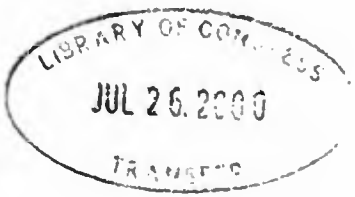

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

H.R. 2112 and H.R. 1752

JUNE 16, 1999

Serial No. 24

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

62-501 WASHINGTON : 2000

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

ISBN 0-16-060484-2

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MULTIDISTRICT, MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT OF 1999 AND FEDERAL COURTS IMPROVEMENT ACT OF 1999

WEDNESDAY JUNE 16, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 2 p.m., in Room 2226, Rayburn House Office Building, Hon. Howard Coble [chairman of the subcommittee] presiding.

Present: Representatives Howard Coble, James E. Sensenbrenner Jr., Bob Goodlatte, Edward A. Pease, and Howard L. Berman.

Staff present: Mitch Glazier, Chief Counsel; Debbie Laman, Counsel; Blaine Merritt, Counsel; Eunice Goldring, Staff Assistant.

OPENING STATEMENT OF CHAIRMAN COBLE

Mr. COBLE. Good afternoon, ladies and gentlemen. The subcommittee will come to order.

Today we consider two bills that will enhance the operations of our Federal courts, H.R. 1752, the Federal Courts Improvement Act of 1999; and H.R. 2112, the Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999.

H.R. 1752 was introduced by the ranking member, Mr. Berman, the gentleman from California, and me by request of the United States Judicial Conference. It contains provisions that the Conference believes are needed to improve the Federal court system, including provisions regarding personnel and other matters described in detail in the memorandum received by members of the subcommittee prior to this hearing. These proposals cover judicial financial administration, judicial process improvements, judiciary personnel administration, benefits, protections, and Criminal Justice Act amendments. Based on the discussion of these proposals, the Ranking Member and I will work together to introduce a bill which will contain those proposals that we believe will be successful in improving the Federal judicial system.

The second bill that we will discuss, H.R. 2112, is authored by the gentleman from Wisconsin, Mr. Sensenbrenner. His legislation consists of two other bills which he has also authored, H.R. 1852 and H.R. 967. In brief, 1852 responds to a 1998 Supreme Court decision pertaining to multidistrict litigation, the so-called *Lexecon*

case. Set forth as section 2 of H.R. 2112, this language would simply amend the multidistrict litigation statute by explicitly allowing a transferee court to retain jurisdiction over referred cases for trial or refer them to other districts as it sees fit.

This change, it seems to me, makes sense in light of past judicial practice under the multidistrict litigation statute and will promote judicial administrative efficiency. Furthermore, section 3 of H.R. 2112 incorporates the language of H.R. 967. It offers what, I believe, are modest but necessary improvements to a specific type of multidistrict litigation, that involving mass torts such as airline or train accidents in which several individuals from different States are killed or injured.

[The text of bills H.R. 1752 and H.R. 2112 follows:]

106TH CONGRESS
1ST SESSION

H. R. 1752

To make improvements in the operation and administration of the Federal courts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 11, 1999

Mr. COBLE (for himself and Mr. BERMAN) (both by request) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To make improvements in the operation and administration of the Federal courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Courts Improvement Act of 1999".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

TITLE I—FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

SEC. 101. PARTIES' CONSENT TO BANKRUPTCY JUDGE'S FINDINGS AND CONCLUSIONS OF LAW.

Section 157(c)(1) of title 28, United States Code, is amended to read as follows:

"(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected. A party shall be deemed to consent to the findings of fact and conclusions of law submitted by a bankruptcy judge unless the party files a timely objection. If a timely objection is not filed, the proposed findings of fact and conclusions of law submitted by the bankruptcy judge shall become final and the bankruptcy judge shall enter an appropriate order thereon.".

TITLE II—JUDICIAL FINANCIAL ADMINISTRATION

SEC. 201. REIMBURSEMENT OF JUDICIARY FOR CIVIL AND CRIMINAL FORFEITURE EXPENSES.

(a) Section 524(c) of title 28, United States Code, is amended—

(1) by inserting after paragraph "(11)" the following paragraph "(12)":

"(12)(A) In the fiscal year subsequent to the fiscal year in which this act is enacted and each fiscal year thereafter, an amount as specified in subpara-

graph (9)(B) shall be transferred annually to the Judiciary into the fund established under section 1931 of this title, for expenses incurred in—

"(i) adjudication of civil and criminal forfeiture proceedings that result in deposits into the Fund (except the expense of salaries of judges);

"(ii) representation, pursuant to the provisions of 18 U.S.C. § 3006A, or 21 U.S.C. § 848(q) of defendants whose assets have been seized in such forfeiture proceedings, to the extent that such expenses of representation could have been recovered through an order for payment or for reimbursement of the Defender Services appropriation pursuant to 18 U.S.C. § 3006A(f); and

"(iii) supervision by United States probation officers of offenders under home detention or other forms of confinement outside of Bureau of Prison facilities.

"(B) The amount to be transferred—

"(i) shall be a portion of the total amount to be transferred from the combined fiscal year deposits into both the Fund and the Department of Treasury Asset Forfeiture Fund established by section 9703 of title 31, United States Code (hereafter referred to as 'both Funds'), which total amount shall not exceed the statement of costs incurred by the Judiciary in providing the services identified in subparagraph (A), as set forth by the Director of the Administrative Office of the United States Courts in a report to the Attorney General and the Secretary of the Treasury no later than 90 days after the end of the fiscal year in which the expenses were incurred; except that (I) provided that the total amount to be transferred from both Funds shall not exceed $50,000,000, or 10 percent of the total combined deposits into both Funds, whichever is less; (II) the proportion of the amount transferred from the Fund to the total amount to be transferred shall be equal to the proportion of the fiscal year deposits into the Fund to the combined fiscal year deposits in both Funds; (III) the total amount to be transferred from both Funds may exceed the limits set out in this subparagraph subject to the discretion of the Attorney General and the Secretary of the Treasury.

"(ii) shall be paid from revenues deposited into the Fund during the fiscal year in which the expenses were incurred and are not required to be specified in appropriations acts.".

(b) TREASURY FORFEITURE FUND.—Section 9703 of title 31, United States Code, is amended—

(1) by redesignating subsection "(p)" as subsection "(q)"; and

(2) by inserting after subsection "(o)" the following new subsection "(p)":

"(p) TRANSFER TO THE FEDERAL JUDICIARY.—In the fiscal year subsequent to the fiscal year in which this Act is enacted and each fiscal year thereafter, an amount necessary to meet the transfer requirements of section 524(c)(9) of title 28, United States Code, shall be transferred to the Judiciary, and shall be subject to the same limitations, terms, and conditions specified in that section for transfers to the Judiciary from the Department of Justice Asset Forfeiture Fund.".

(c) Section 1931(a) of title 28 is amended by inserting "or other judicial services including services provided pursuant to 18 U.S.C. § 3006A, or 21 U.S.C. § 848(q)" after "courts of the United States.".

(d) CONFORMING AMENDMENT.—Section 1931(a) of title 28, United States Code, is amended by inserting "or other judicial services, including services provided pursuant to section 3006A of title 18 or section 408(q) of the Controlled Substances Act (21 U.S.C. 848(q))" after "courts of the United States.".

SEC. 202. TRANSFER OF RETIREMENT FUNDS.

Section 377 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(p) Upon election by a bankruptcy judge or a magistrate judge under subsection (f) of this section, all of the accrued employer contributions and accrued interest on those contributions made on behalf of the bankruptcy judge or magistrate judge to the Civil Service Retirement and Disability Fund as defined under section 8348 of title 5, United States Code, shall be transferred to the fund established under section 1931 of this title except that if the bankruptcy judge or magistrate judge elects under section 2(c) of the Retirement and Survivor's Annuities for Bankruptcy Judges and Magistrates Act of 1988, Public Law 100–659, to receive a retirement annuity under both this section and title 5, United States Code, only the accrued employer contributions and accrued interest on such contributions made on behalf of the bankruptcy judge or magistrate judge for service credited under this section may be transferred.".

SEC. 203. JUDICIARY INFORMATION TECHNOLOGY FUND.

Section 612 of title 28, United States Code, is amended—

(1) by striking "equipment" each place it appears and inserting "resources";

(2) by striking subsection (f) and redesignating subsequent subsections accordingly;

(3) in subsection (g), as so redesignated, by striking paragraph (3); and

(4) in subsection (i), as so redesignated—

(A) by striking "Judiciary" and inserting "judiciary";

(B) by striking "subparagraph (c)(1)(B)" and inserting "subsection (c)(1)(B)"; and

(C) by striking "under (c)(1)(B)" and inserting "under subsection (c)(1)(B)".

SEC. 204. BANKRUPTCY FEES.

Subsection (a) of section 1930 of title 28, United States Code, is amended by adding the following new subsection:

"(7) In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph 6 of this subsection. Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended.".

SEC. 205. DISPOSITION OF MISCELLANEOUS FEES.

For fiscal year 2000 and thereafter, any portion of miscellaneous fees collected as prescribed by the Judicial Conference of the United States pursuant to sections 1913, 1914(b), 1926(a), 1930(b), and 1932 of title 28, United States Code exceeding the amount of such fees established on the date of enactment of this provision shall be deposited into the special fund of the Treasury established under section 1931 of title 28, United States Code.

SEC. 206. REPEAL OF STATUTE SETTING COURT OF FEDERAL CLAIMS FILING FEE.

Section 2520 of title 28, United States Code, and the item relating to such section in the table of contents for chapter 165 of such title, are repealed.

SEC. 207. RENUMBERING OF BANKRUPTCY COURT FEE SCHEDULE.

Section 406(b) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990 (Public Law 101–162; 103 Stat. 1016) is amended in the first sentence by striking "for any service enumerated after item 18" and inserting "for any fee implemented after November 21, 1989".

SEC. 208. INCREASE IN FEE FOR CONVERTING A CHAPTER 7 OR CHAPTER 13 BANKRUPTCY CASE TO A CHAPTER 11 BANKRUPTCY CASE.

(a) CONVERSION FEE INCREASE.—Section 1930(a) of title 28, United States Code, is amended by striking "$400" at the end of subsection (6) and inserting in lieu thereof: "an amount equal to the difference between the filing fee paid under the original chapter and the amount of the filing fee prescribed in section 1930(a)(3) of title 28, for filing a case under chapter 11".

SEC. 209. INCREASE IN CHAPTER 9 BANKRUPTCY FILING FEE.

(a) FILING FEE INCREASE.—Section 1930(a)(2) of title 28, United States Code, is amended by striking "$300" and inserting in lieu thereof "the same amount as the filing fee prescribed in section 1930(a)(3) of title 28, for filing a case under chapter 11. Any portion of the fee exceeding $300 shall be deposited into the special fund of the Treasury established under section 1931 of title 28, United States Code".

SEC. 210. CREATION OF CERTIFYING OFFICERS IN THE JUDICIAL BRANCH.

(a) APPOINTMENT OF DISBURSING AND CERTIFYING OFFICERS.—Chapter 41 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 613. Disbursing and certifying officers

"(a) DISBURSING OFFICERS.—The Director may designate in writing officers and employees of the judicial branch of the Government, including the courts as defined in section 610 other than the Supreme Court, to be disbursing officers in such numbers and locations as the Director considers necessary. Such dispersing officers shall—

"(1) disburse moneys appropriated to the judicial branch and other funds only in strict accordance with payment requests certified by the Director or in accordance with subsection (b);

"(2) examine payment requests as necessary to ascertain whether they are in proper form, certified, and approved; and

"(3) be held accountable for their actions as provided by law, except such a disbursing officer shall not be held accountable or responsible for any illegal, improper, or incorrect payment resulting from any false, inaccurate, or misleading certificate for which a certifying officer is responsible under subsection (b).

"(b) CERTIFYING OFFICERS.—(1) The Director may designate in writing officers and employees of the judicial branch of the Government, including the courts as defined in section 610 other than the Supreme Court, to certify payment requests payable from appropriations and funds. These certifying officers shall be responsible and accountable for—

"(A) the existence and correctness of the facts recited in the certificate or other request for payment or its supporting papers;

"(B) the legality of the proposed payment under the appropriation or fund involved; and

"(C) the correctness of the computations of certified payment requests.

"(2) The liability of a certifying officer shall be enforced in the same manner and to the same extent as provided by law with respect to the enforcement of the liability of disbursing and other accountable officers. A certifying officer shall be required to make restitution to the United States for the amount of any illegal, improper, or incorrect payment resulting from any false, inaccurate, or misleading certificates made by the certifying officer, as well as for any payment prohibited by law or which did not represent a legal obligation under the appropriation or fund involved.

"(c) RIGHTS.—A certifying or disbursing officer—

"(1) has the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment request presented for certification; and

"(2) is entitled to relief from liability arising under this section in accordance with title 31.

"(d) OTHER AUTHORITY NOT AFFECTED.—Nothing in this section affects the authority of the courts with respect to moneys deposited with the courts under chapter 129 of this title.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 41 of title 28, United States Code, is amended by adding at the end the following item:

"613. Disbursing and certifying officers.".

(c) DUTIES OF DIRECTOR.—Paragraph (8) of subsection (a) of section 604 of title 28, United States Code, is amended to read as follows:

"(8) Disburse appropriations and other funds for the maintenance and operation of the courts;".

SEC. 211. FEE AUTHORITY FOR TECHNOLOGY RESOURCES IN THE COURTS.

(a) IN GENERAL.—Chapter 41 of title 28, United States Code is amended by adding at the end the following:

"§ 614. Authority to prescribe fees for technology resources in the courts

"The Judicial Conference is authorized to prescribe reasonable fees pursuant to sections 1913, 1914, 1926, 1930, and 1932, for use of information technology resources provided by the judiciary to improve the efficiency of and access to the courts. Fees collected pursuant to this section are to be deposited in the Judiciary Information Technology Fund to be available to the Director without fiscal year limitation for reinvestment in information technology resources which will advance the purposes of this section.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 41 of title 28, United States Code, is amended by adding at the end the following new item:

"614. Authority to prescribe fees for technology resources in the courts.".

TITLE III—JUDICIAL PROCESS IMPROVEMENTS

SEC. 301. REMOVAL OF CASES UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT.

Section 1445 of title 28, United States Code is amended by adding a new subsection:

"(e) A civil action in any State court may not be removed to any district court of the United States solely on the basis of concurrent jurisdiction over a claim under section 1132(a)(1)(B) of title 29.".

SEC. 302. ELIMINATION OF IN-STATE PLAINTIFF DIVERSITY JURISDICTION.

Section 1332 of title 28, United States Code is amended by redesignating existing subsection (d) as subsection (e), and by adding a new subsection (d) as follows:

"(d) The original jurisdiction of the district courts otherwise conferred by this section may not be invoked if any plaintiff joined in the complaint is a citizen of the State in which is located the district court in which the suit is filed. For purposes of this subsection only, the District of Wyoming shall be deemed located solely within the State of Wyoming. This subsection does not apply to or limit the applicability of the right of removal under section 1441(a) of an action that would otherwise be within the original jurisdiction of the district courts.".

SEC. 303. EXTENSION OF STATUTORY AUTHORITY FOR MAGISTRATE JUDGE POSITIONS TO BE ESTABLISHED IN THE DISTRICT COURTS OF GUAM AND THE NORTHERN MARIANA ISLANDS.

Section 631 of title 28, United States Code, is amended—

(1) by striking the first two sentences of subsection (a) and inserting in lieu thereof the following: "The judges of each United States district court and the district courts of the Virgin Islands, Guam, and the Northern Mariana Islands shall appoint United States magistrate judges in such numbers and to serve at such locations within the judicial districts as the Conference may determine under this chapter. In the case of a magistrate judge appointed by the district court of the Virgin Islands, Guam, or the Northern Mariana Islands, this chapter shall apply as though the court appointing such a magistrate judge were a United States district court."; and

(2) by inserting in the first sentence of paragraph (1) of subsection (b) after "Commonwealth of Puerto Rico," the language "the Territory of Guam, the Commonwealth of the Northern Mariana Islands,".

SEC. 304. BANKRUPTCY ADMINISTRATOR AUTHORITY TO APPOINT TRUSTEES, EXAMINERS AND COMMITTEE OF CREDITORS.

(a) APPOINTMENT OF TRUSTEES.—Until the amendments made by subtitle A of title II of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (28 U.S.C. §581 note; Public Law 99–554; 100 Stat. 3123) become effective in a judicial district and apply to a case, a bankruptcy administrator appointed to serve in the district pursuant to section 302(d)(3)(I) of the Act, as amended by section 317(a) of the Federal Courts Study Committee Implementation Act of 1990 (Public Law 101–650; 104 Stat. 5115) shall appoint the trustees, examiners, and standing trustees notwithstanding the references in those sections of title 11 of appointments by the court.

(b) STANDING TRUSTEES.—A bankruptcy administrator who has appointed a standing trustee pursuant to subsection (a) of this section shall fix the standing trustee's maximum annual compensation and percentage fee, subject to the limitations set out in sections 1202 and 1302 of title 11 as amended by section 110 of the Federal Employee Pay Comparability Act of 1990, Public Law 101–509, 104 Stat. 1427, 1452. The bankruptcy administrator shall fix the maximum annual compensation and percentage fee notwithstanding the references in those sections of title 11 of the court's authority to fix them.

(c) SERVICE AS TRUSTEE.—A bankruptcy administrator may serve as and perform the duties of a trustee in a case under chapter 7 of title 11 if none of the members of the panel of private trustees is disinterested and willing to serve as trustee in the case. The bankruptcy administrator may serve as and perform the duties of a trustee of a trustee or standing trustee in cases under chapter 12 or chapter 13 of title 11 if necessary.

(d) APPOINTMENT OF COMMITTEES.—Until the amendments made by subtitle A of title II of the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986 become effective in a judicial district and apply to a case, the bankruptcy administrator appointed to serve in the district shall appoint the committees of creditors and equity security holders provided in section 1102 of title 11. The bankruptcy administrator shall appoint the committees notwithstanding the references in those sections of title 11 to appointments by the court.

SEC. 305. MAGISTRATE JUDGE CONTEMPT AUTHORITY.

Section 636(e) of the Federal Magistrates Act (28 U.S.C. §636) is amended to read as follows:

"(1) CONTEMPT AUTHORITY.—A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by his or her appointment the power to exercise contempt authority as set forth in this subsection.

"(2) SUMMARY CRIMINAL CONTEMPT AUTHORITY.—A magistrate judge shall have the power to punish summarily by fine or imprisonment such contempt of his or her authority constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued pursuant to Federal Rules of Criminal Procedure.

"(3) ADDITIONAL CRIMINAL CONTEMPT AUTHORITY IN CIVIL CONSENT AND MISDEMEANOR CASES.—In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish by fine or imprisonment such criminal contempt constituting disobedience or resistance to the magistrate judge's lawful, writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing pursuant to the Federal Rules of Criminal Procedure.

"(4) CIVIL CONTEMPT AUTHORITY IN CIVIL CONSENT AND MISDEMEANOR CASES.—In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions pursuant to any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

"(5) CRIMINAL CONTEMPT PENALTIES.—The sentence imposed by a magistrate judge for any criminal contempt set forth in paragraphs (2) and (3) of this subsection shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

"(6) CERTIFICATION OF OTHER CONTEMPTS TO THE DISTRICT COURT.—Upon the commission of any act—

"(A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in subsection (5) of this section, or

"(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where—

"(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in subsection (5) of this subsection; or

"(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

"(iii) the act constitutes a civil contempt,

the magistrate judge shall forthwith certify the facts of a district judge and may serve or cause to be served upon any person whose behavior is brought into question under this paragraph an order requiring such person to appear before a district judge upon a day certain to show cause why he or she should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act of conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

"(7) APPEALS OF MAGISTRATE JUDGE CONTEMPT ORDERS.—The appeal of an order of contempt issued pursuant to this section shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order to contempt issued pursuant to this section shall be made to the district court.".

SEC. 306. CONSENT TO MAGISTRATE JUDGE AUTHORITY IN PETTY OFFENSE CASES AND MAGISTRATE JUDGE AUTHORITY IN MISDEMEANOR CASES INVOLVING JUVENILE DEFENDANTS.

(a) AMENDMENTS TO TITLE 18.—

(1) PETTY OFFENSE CASES.—Section 3401(b) of title 28, United States Code, is amended by striking "that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction," after "petty offense".

(2) CASES INVOLVING JUVENILES.—Section 3401(g) of title 18, United States Code, is amended:

(A) by striking the first sentence and inserting in lieu thereof the following: "The magistrate judge may, in a petty offense case involving a juvenile, exercise all powers granted to the district court under chapter 403 of this title.";

(B) by striking in the second sentence the phrase "any other class B or C misdemeanor case" and inserting "the case of any misdemeanor, other than a petty offense,"; and

(C) by striking the last sentence.

(b) AMENDMENTS TO TITLE 28.—Section 636(a) of title 28, United States Code, is amended by striking paragraphs (4) and (5) and inserting the following:

"(4) the power to enter a sentence for a petty offense; and

"(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.".

SEC. 307. SAVINGS AND LOAN DATA REPORTING REQUIREMENTS.

Section 604 of title 28, United States Code, is amended in subsection (a) by striking the second paragraph designated (24).

SEC. 308. PLACE OF HOLDING COURT IN THE EASTERN DISTRICT OF TEXAS.

(a) TEXAS.—The second sentence of section 124(c)(3) of title 28, United States Code, is amended by inserting "and Plano" after "held at Sherman".

(b) TEXARKANA.—Sections 83(b)(1) and 124(c)(6) of title 28, United States Code, are amended by adding to the end of the last sentence: ", and may be held anywhere within the Federal courthouse in Texarkana that is located astride the State line between Texas and Arkansas".

SEC. 309. FEDERAL SUBSTANCE ABUSE TREATMENT PROGRAM REAUTHORIZATION.

Section 4(a) of the Contract Services for Drug Dependent Federal Offenders Treatment Act of 1978 (Public Law 95–537; 93 Stat. 2038), as amended, is amended by striking all that follows "there are authorized to be appropriated" and inserting in lieu thereof "for fiscal year 2000 and each fiscal year thereafter such sums as may be necessary to carry out this Act.".

SEC. 310. MULTIDISTRICT LITIGATION.

(a) Section 1407 of title 28, United States Code, is amended—

(1) in subsection (a) after "terminated" by inserting "or ordered transferred by the transferee judge to the transferee or other district under subsection (i) of this section"; and

(2) by adding at the end the following new subsection:

"(i) Any action transferred under this section by the panel may be transferred by the transferee judge for trial purposes to the transferee or other district in the interest of justice and for the convenience of the parties and witnesses.".

(b) The amendments made by this section shall apply to any civil action pending on or after the date of enactment of this Act.

SEC. 311. MEMBERSHIP IN CIRCUIT JUDICIAL COUNCILS.

Section 332 of title 28, United States Code, is amended in subsection (a)—

(1) by striking out paragraph (3) and inserting in lieu thereof the following:

"(3) Except for the chief judge of the circuit, either judges in regular active service or judges retired from regular active service under section 371(b) of this title may serve as members of the council."; and

(2) by striking out "retirement," in paragraph (5) and inserting in lieu thereof "retirement pursuant to section 371(a) or section 372(a) of this title,".

SEC. 312. SUNSET OF CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS.

Section 103(b)(2)(A) of the Civil Justice Reform Act of 1990 (Public Law 101–650; 104 Stat. 5096; 28 U.S.C. 471 note), as amended by Public Law 105–53 (111 Stat. 1173), is amended by inserting "471," after "sections".

SEC. 313. TECHNICAL BANKRUPTCY CORRECTION.

Section 1228 of title 11, United States Code, is amended by striking "1222(b)(10)" each place it appears and inserting "1222(b)(9).".

TITLE IV—JUDICIAL PERSONNEL ADMINISTRATION, BENEFITS, AND PROTECTIONS

SEC. 401. JUDICIAL RETIREMENT MATTERS.

(a) Section 371 of title 28, United States Code, is amended—

(1) in subsection (a) by inserting "(1)" after "subsection (c)";

(2) in subsection (b)(1) by inserting "(2)" after "subsection (c)"; and

(3) in subsection (c)—

(A) by inserting "(1)" after "(c)";

(B) by striking out "this section" and inserting in lieu thereof "subsection (a)"; and

(C) by adding at the end of that subsection the following new paragraph:

"(2) The age and service requirements for retirement under subsection (b)(1) are as follows:

"Attained age:	Years of service:
60	20
61	19
62	18
63	17
64	16
65	15
66	14
67	13
68	12
69	11
70	10".

SEC. 402. DISABILITY RETIREMENT AND COST-OF-LIVING ADJUSTMENTS OF ANNUITIES FOR TERRITORIAL JUDGES.

Section 373 of title 28, is amended—

(1) by amending subsection (c)(4) to read as follows—

"(4) Any senior judge performing judicial duties pursuant to recall under paragraph (2) of this subsection shall be paid, while performing such duties, the same compensation (in lieu of the annuity payable under this section) and the same allowances for travel and other expenses as a judge on active duty with the court being served.";

(2) by amending subsection (e) to read—

"(e)(1) any judge of the District Court of Guam, the District Court of the Northern Mariana Islands, or the District Court of the Virgin Islands who is not reappointed (as judge of such court) shall be entitled, upon attaining the age of sixty-five years or upon relinquishing office if the judge is then beyond the age of sixty-five years—

"(A) if the judicial service of such judge, continuous or otherwise, aggregates fifteen years or more, to receive during the remainder of such judge's life an annuity equal to the salary received when the judge left office, or

"(B) if such judicial service, continuous or otherwise, aggregated less then fifteen years, to receive during the remainder of such judge's life an annuity equal to that proportion of such salary which the aggregate number of such judge's years of service bears to fifteen.

"(2) Any judge of the District Court of Guam, the District Court of the Northern Mariana Islands, or the District Court of the Virgin Islands who has served at least five years, continuously or otherwise, and who retires or is removed upon the sole ground of mental or physical disability, shall be entitled to receive during the remainder of such judge's life an annuity equal to 40 percent of the salary received when the judge left office or, in the case of a judge who has served at least ten years, continuously or otherwise, an annuity equal to that proportion of such salary which the aggregate number of such judge's years of judicial service bears to fifteen."; and

(3) amending subsection (g) to read—

"(g) Any retired judge who is entitled to receive an annuity under this section shall be entitled to a cost-of-living adjustment in the amount computed as specified in section 8340(b) of title 5, except that in no case may the annuity payable to such retired judge, as increased under this subsection, exceed the salary of a judge in regular active service with the court on which the retired judge served before retiring.".

SEC. 403. FEDERAL JUDICIAL CENTER PERSONNEL MATTERS.

Section 625 of title 28, United States Code, is amended—

(1) in subsection (b)—

(A) by striking ", United States Code,";

(B) by striking "pay rates, section 5316, title 5, United States Code" and inserting "under section 5316 of title 5, except that the Director may fix the compensation of 4 positions of the Center at a level not to exceed the annual rate of pay in effect for level IV of the Executive Schedule under section 5315 of title 5"; and

(C) by striking "the Civil Service" and all that follows through "Code" and inserting "subchapter III of chapter 83 of title 5 shall be adjusted pursuant to the provisions of section 8344 of such title, and the salary of a reemployed annuitant under chapter 84 of title 5 shall be adjusted pursuant to the provisions of section 8468 of such title"; and

(2) in subsections (c) and (d) by striking ", United States Code," each place it appears.

SEC. 404. JUDICIAL ADMINISTRATIVE OFFICIALS RETIREMENT MATTERS.

(a) CREDITABLE SERVICE FOR CERTAIN JUDICIAL ADMINISTRATIVE OFFICIALS.—

(1) Sections 611(d) and 627(e) of title 28, United States Code, are each amended—

(A) by inserting "a congressional employee in the capacity of primary administrative assistant to a Member of Congress or in the capacity of staff director or chief counsel for the majority or the minority of a committee or subcommittee of the Senate or House of Representatives," after "Congress.";

(B) in paragraph (b), by striking out "who has served at least fifteen years and" and inserting in lieu thereof "who has at least fifteen years of service and has"; and

(C) in the first undesignated paragraph, by striking out "who has served at least ten years," and inserting in lieu thereof "who has at least ten years of service,".

(2) Sections 611(c) and 627(d) of such title are each amended—

(A) by striking out "served at least fifteen years," and inserting in lieu thereof "at least fifteen years of service,"; and

(B) by striking out "served less than fifteen years," and inserting in lieu thereof "less than fifteen years of service,".

SEC. 405. JUDGES' FIREARMS TRAINING.

(a) IN GENERAL.—Chapter 21 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 464. Carrying of firearms by judicial officers

"(a) A judicial officer of the United States is authorized to carry a firearm, whether concealed or not, under regulations promulgated by the Judicial Conference of the United States. The authority granted by this section shall extend only to (1) those states in which the carrying of firearms by judicial officers of the state is permitted by state law, or (2) regardless of state law, to any place where the judicial officer of the United States sits, resides, or is present on official travel status.

"(b) IMPLEMENTATION.—

"(1) The regulations promulgated by the Judicial Conference under subsection (a) shall—

"(A) require a demonstration of a judicial officer's proficiency in the use and safety of firearms as a prerequisite to carrying of firearms under the authority of this section; and

"(B) ensure that the carrying of a firearm by a judicial officer under the protection of the United States Marshals Service while away from United States courthouses is consistent with Marshals Service policy on carrying of firearms by persons receiving such protection.

"(2) ASSISTANCE BY OTHER AGENCIES.—At the request of the Judicial Conference, the Department of Justice and appropriate law enforcement components of the Department shall assist the Judicial Conference in developing and providing training to assist judicial officers in securing the proficiency referred to in subsection (b)(1).

"(c) DEFINITION.—For purposes of this section, the term "judicial officer of the United States" means—

"(1) a justice or judge of the United States as defined in section 451 of this title in regular active service or retired from regular active service;

"(2) a justice or judge of the United States who has retired from the judicial office under section 371(a) of this title for—

"(A) a 1-year period following such justice's or judge's retirement; or

"(B) a longer period of time if approved by the Judicial Conference of the United States when exceptional circumstances warrant;

"(3) a United States bankruptcy judge;

"(4) a full-time or part-time United States magistrate judge;

"(5) a judge of the United States Court of Federal Claims;

"(6) a judge of the United States District Court of Guam;

"(7) a judge of the United States District Court for the Northern Mariana Islands;

"(8) a judge of the United States District Court of the Virgin Islands; or

"(9) an individual who is retired from one of the judicial positions described under paragraphs (3) through (8) to the extent provided for in regulations of the Judicial Conference of the United States.

"(d) EXCEPTION.—Notwithstanding section 46303(c)(1) of title 49, nothing in this section authorizes a judicial officer of the United States to carry a dangerous weapon on an aircraft or other common carrier.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 21 of title 28, United States Code, is amended by adding at the end thereof the following:

"464. Carrying of firearms by judicial officers.".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect upon the earlier of the promulgation of regulations by the Judicial Conference under this section or one year after the date of the enactment of this Act.

SEC. 406. DELETION OF AUTOMATIC EXCUSE FROM JURY SERVICE FOR MEMBERS OF THE ARMED SERVICES, MEMBERS OF FIRE AND POLICE DEPARTMENTS, AND PUBLIC OFFICERS.

(a) Section 1863 of title 28, United States Code, is amended by repealing subsection (b)(6) and redesignating subsequent subsections accordingly.

(b) CONFORMING AMENDMENT.—Section 1869 of title 28 United States Code, is amended by repealing subsection (i) and redesignating subsequent subsections accordingly.

(c) Section 982 of title 10 United States Code, is amended—

(1) by inserting the term "Federal," in the title immediately following the term "service on"; and

(2) by inserting the term "Federal" in subsection (a) immediately following the term "required to serve on a".

SEC. 407. EXPANDED WORKERS' COMPENSATION COVERAGE FOR JURORS.

Paragraph (2) of section 1877(b) of title 28, United States Code, is amended—

(1) by striking "or" at the end of clause (C); and

(2) by inserting before the period at the end of clause (D) ", or (E) traveling to or from the courthouse pursuant to a jury summons or sequestration order, or as otherwise necessitated by order of the court".

SEC. 408. PROPERTY DAMAGE, THEFT, AND LOSS OF JURORS.

Section 604 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(i) The Director may pay a claim by a person summoned to serve or serving as a grand juror or petit juror for loss of, or damage to, personal property that occurs incident to that person's performance of duties in response to the summons or at the direction of an officer of the court. With respect to claims, the Director shall have the authority granted to the head of an agency by section 3721 of title 31, for consideration of employee's personal property claims. The Director shall prescribe guidelines for the consideration of claims under this subsection.".

SEC. 409. ELIMINATION OF THE PUBLIC DRAWING REQUIREMENTS FOR SELECTION OF JUROR WHEELS.

(a) Section 1864(a) of title 28, United States Code, is amended—

(1) by striking the term "publicly" from the first sentence; and

(2) by inserting the sentence "The clerk or jury commission shall post a general notice for public review in the clerk's office explaining the process by which names are periodically and randomly drawn." immediately following first sentence.

(b) Section 1866(a) of title 28, United States Code, is amended—

(1) by striking the term "publicly" from the second sentence; and

(2) by inserting the sentence "The clerk or jury commission shall post a general notice for public review in the clerk's office explaining the process by which names are periodically and randomly drawn." immediately following the second sentence.

(c) CONFORMING AMENDMENT.—Section 1869(k) of title 28, United States Code, is repealed.

SEC. 410. ANNUAL LEAVE LIMIT FOR COURT UNIT EXECUTIVES.

Section 6304(f)(1) of title 5 is amended to add at the end thereof:

"(F) the Judicial Branch designated as a court unit executive position by the Judicial Conference of the United States.".

SEC. 411. PAYMENTS TO MILITARY SURVIVOR BENEFIT PLAN.

Section 371(e) of title 28, United States Code, is amended by inserting after "such retired or retainer pay" the following: ", except such pay as is deductible from the retired or retainer pay as a result of participation in any survivor's benefits plan in connection with the retired pay,".

SEC. 412. AUTHORIZATION OF A CIRCUIT EXECUTIVE FOR THE FEDERAL CIRCUIT.

Section 332 of title 28, United States Code, is amended by inserting the following new subsection after subsection (g):

"(h)(1) The United States Court of Appeals for the Federal Circuit may appoint a circuit executive, who shall serve at the pleasure of the court. In appointing a circuit executive, the court shall take into account experience in administrative and executive positions, familiarity with court procedures, and special training. The circuit executive shall exercise such administrative powers and perform such duties as may be delegated by the court. The duties delegated to the circuit executive may include but need not be limited to the duties specified in subsection (e) of this section, insofar as they are applicable to the Court of Appeals for the Federal Circuit.

"(2) The circuit executive shall be paid the salary for circuit executives established under subsection (f) of this section.

"(3) The circuit executive may appoint, with the approval of the court, necessary employees in such number as may be approved by the Director of the Administrative Office of the United States Courts.

"(4) The circuit executive and staff shall be deemed to be officers and employees of the United States within the meaning of the statutes specified in subsection (f).

"(5) The court may appoint either a circuit executive or a clerk under section 711 of title 28, but not both, or may appoint a combined circuit executive/clerk who shall be paid the salary of a circuit executive.".

SEC. 413. AMENDMENT TO THE JURY SELECTION PROCESS.

(a) Section 1865 of title 28, United States Code, is amended—

(1) in subsection (a) by inserting the phrase "or the clerk under supervision of the court if the court's jury selection plan so authorizes," following the term "jury commission"; and

(2) in subsection (b) by inserting the phrase "or the clerk if the court's jury selection plan so provides," following the term "may provide".

SEC. 414. SUPPLEMENTAL ATTENDANCE FEE FOR PETIT JURORS SERVING ON LENGTHY TRIALS.

Section 1871(b)(2) of title 28, United States Code, is amended by striking out "thirty" in each place it occurs, and inserting in lieu thereof "five".

TITLE V—CRIMINAL JUSTICE ACT AMENDMENTS

SEC. 501. MAXIMUM AMOUNTS OF COMPENSATION FOR ATTORNEYS.

Paragraph (2) of subsection (d) of section 3006A of title 18, United States Code, is amended—

(1) in the first sentence—

(A) by striking out "3,500" and inserting "5,400";

(B) by striking out "1,000" and inserting "1,600";

(2) in the second sentence by striking out "2,500" and inserting "3,900";

(3) in the third sentence—

(A) by striking out "750" and inserting "1,200";

(B) by striking out "2,500" and inserting "3,900";

(4) by inserting after the second sentence, a new sentence: "For representation of a petitioner in a non-capital habeas corpus proceeding, the compensation for each attorney shall not exceed the amount applicable to a felony in this paragraph for representation of a defendant before a United States magistrate or the district court, or both. For representation of such petitioner in an appellate court, the compensation for each attorney shall not exceed the amount applicable for representation of a defendant in an appellate court."; and

(5) in the final sentence by striking out "750" and inserting "1,200".

SEC. 502. MAXIMUM AMOUNTS OF COMPENSATION FOR SERVICES OTHER THAN COUNSEL.

(a) Paragraph (2) of subsection (e) of section 3006A of title 18, United States Code, is amended—

(1) in subparagraph (A) by striking out "300" and inserting "500"; and
(2) in subparagraph (B) by striking out "300" and inserting "500".

(b) Paragraph (3) of subsection (e) in the first sentence is amended by striking out "1,000" and inserting "1,600".

SEC. 503. TORT CLAIMS ACT AMENDMENTS RELATING TO LIABILITY OF FEDERAL PUBLIC DEFENDERS.

Section 2671 of title 28, United States Code, is amended in the second undersigned paragraph—

(1) by inserting "(1)" after "includes"; and
(2) by striking the period at the end and inserting the following: ", and (2) any officer or employee of a Federal Public Defender Organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.".

106TH CONGRESS
1ST SESSION

H. R. 2112

To amend title 28, United States Code, to allow a judge to whom a case is transferred to retain jurisdiction over certain multidistrict litigation cases for trial, and to provide for Federal jurisdiction of certain multiparty, multiforum civil actions.

IN THE HOUSE OF REPRESENTATIVES

JUNE 9, 1999

Mr. SENSENBRENNER (for himself, Mr. HYDE, and Mr. COBLE) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, to allow a judge to whom a case is transferred to retain jurisdiction over certain multidistrict litigation cases for trial, and to provide for Federal jurisdiction of certain multiparty, multiforum civil actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999".

SEC. 2. MULTIDISTRICT LITIGATION.

Section 1407 of title 28, United States Code, is amended—

(1) in the third sentence of subsection (a), by inserting "or ordered transferred to the transferee or other district under subsection (i)" after "terminated"; and

(2) by adding at the end the following new subsection:

"(i) Except as provided in subsection (j), any action transferred under this section by the panel may be transferred for trial purposes, by the judge or judges of the transferee district to whom the action was assigned, to the transferee or other district in the interest of justice and for the convenience of the parties and witnesses.".

SEC. 3. MULTIPARTY, MULTIFORUM JURISDICTION OF DISTRICT COURTS.

(a) BASIS OF JURISDICTION.—

(1) IN GENERAL.—Chapter 85 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1369. Multiparty, multiforum jurisdiction

"(a) IN GENERAL.—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location and, in the case of injury, the injury has resulted in damages which exceed $50,000 per person, exclusive of interest and costs, if—

"(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defend-

ant is also a resident of the State where a substantial part of the accident took place;

"(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or

"(3) substantial parts of the accident took place in different States.

"(b) SPECIAL RULES AND DEFINITIONS.—For purposes of this section—

"(1) minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of this title;

"(2) a corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of any State in which it is incorporated or licensed to do business or is doing business;

"(3) the term 'injury' means—

"(A) physical harm to a natural person; and

"(B) physical damage to or destruction of tangible property, but only if physical harm described in subparagraph (A) exists;

"(4) the term 'accident' means a sudden accident, or a natural event culminating in an accident, that results in death or injury incurred at a discrete location by at least 25 natural persons; and

"(5) the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

"(c) INTERVENING PARTIES.—In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

"(d) NOTIFICATION OF JUDICIAL PANEL ON MULTIDISTRICT LITIGATION.—A district court in which an action under this section is pending shall promptly notify the judicial panel on multidistrict litigation of the pendency of the action.".

(2) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 85 of title 28, United States Code, is amended by adding at the end the following new item:

"1369. Multiparty, multiforum jurisdiction.".

(b) VENUE.—Section 1391 of title 28, United States Code, is amended by adding at the end the following:

"(g) A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.".

(c) MULTIDISTRICT LITIGATION.—Section 1407 of title 28, United States Code, as amended by section 2 of this Act, is further amended by adding at the end the following:

"(j)(1) In actions transferred under this section when jurisdiction is or could have been based, in whole or in part, on section 1369 of this title, the transferee district court may, notwithstanding any other provision of this section, retain actions so transferred for the determination of liability and punitive damages. An action retained for the determination of liability shall be remanded to the district court from which the action was transferred, or to the State court from which the action was removed, for the determination of damages, other than punitive damages, unless the court finds, for the convenience of parties and witnesses and in the interest of justice, that the action should be retained for the determination of damages.

"(2) Any remand under paragraph (1) shall not be effective until 60 days after the transferee court has issued an order determining liability and has certified its intention to remand some or all of the transferred actions for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the transferee court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the transferee court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

"(3) An appeal with respect to determination of punitive damages by the transferee court may be taken, during the 60-day period beginning on the date the order making the determination is issued, to the court of appeals with jurisdiction over the transferee court.

"(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

"(5) Nothing in this subsection shall restrict the authority of the transferee court to transfer or dismiss an action on the ground of inconvenient forum.".

(d) REMOVAL OF ACTIONS.—Section 1441 of title 28, United States Code, is amended—

(1) in subsection (e) by striking "(e) The court to which such civil action is removed" and inserting "(f) The court to which a civil action is removed under this section"; and

(2) by inserting after subsection (d) the following new subsection:

"(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

"(A) the action could have been brought in a United States district court under section 1369 of this title, or

"(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

"(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

"(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

"(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

"(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1368 of this title for purposes of this section and sections 1407, 1660, 1697, and 1785 of this title.

"(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.".

(e) CHOICE OF LAW.—

(1) DETERMINATION BY THE COURT.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1660. Choice of law in multiparty, multiforum actions

"(a) FACTORS.—In an action which is or could have been brought, in whole or in part, under section 1369 of this title, the district court in which the action is brought or to which it is removed shall determine the source of the applicable substantive law, except that if an action is transferred to another district court, the transferee court shall determine the source of the applicable substantive law. In making this determination, a district court shall not be bound by the choice of law rules of any State, and the factors that the court may consider in choosing the applicable law include—

"(1) the place of the injury;

"(2) the place of the conduct causing the injury;

"(3) the principal places of business or domiciles of the parties;

"(4) the danger of creating unnecessary incentives for forum shopping; and

"(5) whether the choice of law would be reasonably foreseeable to the parties.

The factors set forth in paragraphs (1) through (5) shall be evaluated according to their relative importance with respect to the particular action. If good cause is shown in exceptional cases, including constitutional reasons, the court may allow the law of more than one State to be applied with respect to a party, claim, or other element of an action.

"(b) ORDER DESIGNATING CHOICE OF LAW.—The district court making the determination under subsection (a) shall enter an order designating the single jurisdiction whose substantive law is to be applied in all other actions under section 1369 arising from the same accident as that giving rise to the action in which the determination is made. The substantive law of the designated jurisdiction shall be applied to the parties and claims in all such actions before the court, and to all other elements of each action, except where Federal law applies or the order specifically provides for the application of the law of another jurisdiction with respect to a party, claim, or other element of an action.

"(c) CONTINUATION OF CHOICE OF LAW AFTER REMAND.—In an action remanded to another district court or a State court under section 1407(j)(1) or 1441(e)(2) of this title, the district court's choice of law under subsection (b) shall continue to apply.".

(2) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 111 of title 28, United States Code, is amended by adding at the end the following new item:

"1660. Choice of law in multiparty, multiforum actions.".

(f) SERVICE OF PROCESS.—

(1) OTHER THAN SUBPOENAS.—(A) Chapter 113 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1697. Service in multiparty, multiforum actions

"When the jurisdiction of the district court is based in whole or in part upon section 1369 of this title, process, other than subpoenas, may be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.".

(B) The table of sections at the beginning of chapter 113 of title 28, United States Code, is amended by adding at the end the following new item:

"1697. Service in multiparty, multiforum actions.".

(2) SERVICE OF SUBPOENAS.—(A) Chapter 117 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1785. Subpoenas in multiparty, multiforum actions

"When the jurisdiction of the district court is based in whole or in part upon section 1369 of this title, a subpoena for attendance at a hearing or trial may, if authorized by the court upon motion for good cause shown, and upon such terms and conditions as the court may impose, be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.".

(B) The table of sections at the beginning of chapter 117 of title 28, United States Code, is amended by adding at the end the following new item:

"1785. Subpoenas in multiparty, multiforum actions.".

SEC. 4. EFFECTIVE DATE.

(a) SECTION 2.—The amendments made by section 2 shall apply to any civil action pending on or brought on or after the date of the enactment of this Act.

(b) SECTION 3.—The amendments made by section 3 shall apply to a civil action if the accident giving rise to the cause of action occurred on or after the 90th day after the date of the enactment of this Act.

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MR. COBLE. Mr. Berman will likely join us later. I believe that Mr. Sensenbrenner has a previous engagement so I will now recognize him for an opening statement.

[The prepared statement of Mr. Coble follows:]

PREPARED STATEMENT OF HON. HOWARD COBLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA, AND CHAIRMAN, SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY

Good morning. The Subcommittee will come to order.

Today we consider two bills that will enhance the operations of our federal courts: H.R. 1752, the "Federal Courts Improvement Act of 1999," and H.R. 2112, the "Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999."

H.R. 1752 was introduced by the Ranking Member, Mr. Berman, and myself, by request of the United States Judicial Conference. It contains provisions that the Conference believes are needed to improve the Federal Court system, including provisions regarding personnel and other matters described in detail in the memorandum received by Members of the Subcommittee prior to this hearing. These proposals cover Judicial Financial Administration, Judicial Process Improvements, Judiciary Personnel Administration, Benefits, Protections, and Criminal Justice Act Amendments. Based on the discussion of these proposals, the Ranking Member and I will work together to introduce a bill which will contain those proposals that we believe will be successful in improving the Federal Judicial System.

The second bill we will discuss, H.R. 2112, is authored by the Gentleman from Wisconsin, Mr. Sensenbrenner. His legislation consists of two other bills which he has also authored, H.R. 1852 and H.R. 967. In brief, 1852 responds to a 1998 Supreme Court decision pertaining to multidistrict litigation—the so-called *'Lexecon'* case. Set forth as Section 2 of H.R. 2112, this language would simply amend the multidistrict litigation statute by explicitly allowing a transferee court to retain jurisdiction over referred cases for trial, or refer them to other districts, as it sees fit. This change makes sense in light of past judicial practice under the Multidistrict Litigation statute, and will promote judicial administrative efficiency.

In addition, Section 3 of H.R. 2112 incorporates the language of H.R. 967. It offers what I believe are modest but necessary improvements to a specific type of multidistrict litigation—that involving mass torts, such as airline or train accidents in which several individuals from different states are killed or injured.

I now turn to the Ranking Member of the Subcommittee, Mr. Berman, for his opening statement.

(When opening statements have concluded. . .)

We will begin with H.R. 1752, the courts improvement bill. The first panel will please come forward.

Mr. SENSENBRENNER. I thank the Chairman for giving me the opportunity to get a plug in for my bill now rather than waiting for the second panel since I don't know whether I will be called elsewhere at that time. But I want to thank you for including this bill as part of our hearing today.

As you know, the multidistrict Multiparty, Multiforum Jurisdiction Act of 1999 is a combination of the contents of two other measures that I have how offered, H.R. 1852 and H.R. 967. Section 2 of H.R. 2112 is identical to the first bill which I introduced on May 18 at the request of the administrative offices of the U.S. Courts. The administrative office is concerned over a Supreme Court decision in the so-called Lexecon case pertaining to section 1407, title 28, U.S. Code.

This statute governs Federal multidistrict litigation. Under the statute, a special panel of Federal judges attempts to identify the one district court nationwide that is best suited to adjudicate pretrial matters in multidistrict cases. The panel then remands the individual cases back to the districts where they were originally filed for trial unless they have been previously terminated.

For approximately 30 years, however, the district courts selected by the panel to hear the pretrial matters, called the transferee court, often invoked the general venue statutes to retain jurisdiction for trial matters over all of the suits. In effect the court selected by the panel simply transferred all of the cases to itself.

According to the administrative office, this process worked well since the transferee court was versed in the facts of the law that consolidated litigation. This was also the one court which could compel all parties when appropriate. The Lexecon decision altered the section 1407 landscape. The Supreme Court effectively determined that section 1407 explicitly requires the transferee court to remand all cases for trial back to the respective jurisdiction from which they came.

And in his opinion, Justice Souter observed that the floor of Congress was the proper venue to determine whether the practice of self-assignment under these conditions should continue. This bill does allow that to happen. Section 2 of the bill responds to Justice Souter's admonition. It would simply amend section 1407 by explicitly allowing the transferee court to retain jurisdiction over all referred cases for trial or to refer them to other districts as it sees fit.

Section 3 of H.R. 2112 contains the text of H.R. 987 which I introduced on March 3. This bill is the same language that passed the House of Representatives during the 101st and 102nd Congress with Democratic majorities. The committee on the judiciary favorably reported a similar bill during the 103rd Congress, also under a Democratic majority, and just last Congress the House approved the legislation of section 10 of H.R. 1252, the Judicial Reform Act.

The Judicial Conference and the Department Of Justice has supported this measure in the past. Section 3 of H.R. 2112 bestows the regular jurisdictions on Federal district courts in civil actions involving minimal diversity jurisdiction among the adverse parties based on a single accident such as a plane or train crash where at least 25 persons have either died or sustained injuries exceeding $50,000 per person.

The transferee court would retain those cases for the determination of liability and punitive damages and would also determine the substantive law that would apply for liability and punitive damages. If liability is established, the transferee court will then remand the appropriate cases back to the State and Federal courts from which they were referred for a determination of compensatory and actual damages.

Section 3 will help reduce litigation costs as well as the likelihood of forum shopping in single mass-action court cases. All of the plaintiffs in these cases would ordinarily be situated identically making the case for consolidation of their actions especially compelling. These types of disasters with their hundreds of plaintiffs and numerous defendants have the potential to impair orderly administration of justice in Federal court.

In addition, an effective one-time determination of punitive damages would eliminate multiple or inconsistent awards from multiforum litigation. Multiple assessments of punitive damages will not make a defendant money-smart to deter future misconduct. It will only increase the likelihood that the defendant will be financially ruined and the victims potentially unable to collect their damages.

In sum, Mr. Chairman, this legislation speaks to process, fairness, and judicial efficiency. It will not interfere with jury verdicts or compensation rates for litigators.

I, therefore, urge my colleagues to support the multidistrict Multiparty, Multiforum Jurisdiction Act when we proceed to mark up, and I yield back the balance of my time.

Mr. COBLE. I thank the gentleman. The Chair recognizes the gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. Thank you for scheduling this hearing.

This is the first hearing to address legislation within our subcommittee's jurisdiction regarding the Federal courts area since my assumption as Ranking Member, and while our subcommittee may be known best for our intellectual property jurisdiction, I want to underscore my commitment to our responsibilities toward the Federal courts as well. Assuring access to our Federal courts, maintaining their high caliber, both are of great importance to me.

If I could figure out a way to persuade the other body to do its part in our Constitutional scheme, I most assuredly would. But in the meantime, we have two bills before our consideration. 1752, the Federal Courts Improvement Act of 1999, is a bill that I was happy to introduce with you, Mr. Chairman, at the request of the Judicial Conference. And we have several witnesses from the judicial branch who will present testimony in support of this bill. Then the other bill, H.R. 2112, which comprises what had previously been two separate bills, first of all, addressing the Supreme Court's decision in the Lexecon case. I very much support that portion of the bill. And then other proposals incorporated earlier in freestanding legislation by the gentleman from Wisconsin containing proposals to revise procedures in certain mass tort situations. On this one, I am more agnostic, but I look forward to the testimony.

Mr. COBLE. I thank the gentleman. The gentleman from Indiana.

Mr. PEASE. No statement, Mr. Chairman.

Mr. COBLE. The first witness on panel one will be the Honorable Joel B. Rosen who is the United States Magistrate Judge for Camden, New Jersey. He is the current president of the Federal Magistrate Judges Association. He received his JD degree with honors from Rutgers University School of Law. Judge Rosen is accompanied by the Honorable Robert B. Collings who is the United States Magistrate Judge from Boston, Massachusetts, and also legislative chair of the United States Courthouse.

Our next witness will be the Honorable Harvey F. Schlesinger who is the United States District Judge for the Middle District of Florida. Judge Schlesinger was nominated for appointment by President Bush and confirmed by the Senate in 1991. Judge Schlesinger earned his JD degree from the University of Richmond School of Law in 1965.

We have written statements from all of the witnesses on this panel, and I ask unanimous consent to submit them into the record in their entirety.

Gentlemen, we operate under what we popularly call the 5-minute rule here. When that red light illuminates in your eyes, that is a warning to you that the Federal marshal may be here to haul you away.

We don't enforce it that strictly, but we do have the Juvenile Justice Bill on the floor today. I know that we will have votes. Mr. Berman, have you heard anything about the timing of the votes?

Mr. BERMAN. No, I haven't.

Mr. COBLE. I am confident that we will be interrupted at least once or perhaps twice for votes. So when the red light does illuminate, if you could, wrap it up. We have examined your written statements. We will examine them again. It is good to have you with us.

Mr. COBLE. Judge Rosen, why don't you commence.

Mr. ROSEN. It is a pleasure, Mr. Chairman, members of the committee. If there is no objection, I would like to defer to Judge Schlesinger who is the chair of the Magistrate Judge Association.

STATEMENT OF HARVEY F. SCHLESINGER, JUDGE, UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Mr. SCHLESINGER. Thank you, Mr. Chairman. It is an honor to appear this afternoon along with my distinguished colleagues. Judge Nangle will be on the second panel to discuss the multidistrict litigation legislation.

Since October of last year, I have had the honor of chairing the Judicial Conference Committee on the administration of the Magistrate Judges' System. What I would like to do this afternoon is to discuss briefly a few of the provisions of the pending legislation, Judge Rosen will then speak on the sections most important to them dealing with consent and also with the question of contempt.

Mr. Chairman, each of the 42 sections of H.R. 1752 have been thoroughly studied by at least one of the 23 committees of the Judicial Conference of the United States and have been deemed important enough by the Judicial Conference of the United States to be included in this court improvements bill. I want to thank you, Mr. Chairman, and the Ranking Member for introducing the bill and scheduling these hearings.

Some of the provisions of this bill have been before you before. Twenty-nine of these passed in the House, H.R. 2294, last year. Each of the provisions of this bill are important because they are contributing in some measure to the efficiency of the judicial branch of the government by saving time, money, and resources. And the Judicial Conference sincerely appreciates this subcommittee's continued interest in the legislation that is needed for the Federal court system.

With your permission, Mr. Chairman, I have included as appendix A to my written statement an additional recommendation of the Board of the Federal Judicial Center. This proposal deals with the elimination of the mandatory retirement age of the Director of the Federal Judicial Center which currently is at age 70.

I hope that you might be able to add this provision when you consider the bill in your mark up. Also with respect to the written statement that I have submitted, there is one typographical error, and that is on page 8 in the first sentence of the first full paragraph. It should read bill 1752, not last year's 2294 as stated therein.

Now, with respect to my statement, and then I will be happy to respond to questions, let me address section 305 which would confer limited contempt authority on magistrate judges, and as chairman of that committee, I have a particularly strong interest in this

issue. Presently, the lack of adequate contempt authority by magistrate judges undermines both the magistrate judge's and the district court's authority when confronted with misconduct or failure to obey court orders.

This section of the bill would provide magistrate judges with limited summary criminal contempt authority to punish egregious misbehavior occurring in their presence. The bill would confer such authority on magistrate judges whenever a magistrate judge presides for the district court regardless of the litigants consent such as conducting initial appearances, bail hearings, or pretrial matters in both civil and criminal cases.

The bill would also provide magistrate judges with additional contempt authority in cases in which the parties have consented fully to proceed before the magistrate judge in civil matters under 636 C of title 28 or in misdemeanor cases under title 18 of the United States Code, section 3401. In those cases, magistrate judges enter final judgments and such contempt authority as necessary to enable magistrate judges to enforce compliance with court orders.

Importantly, section 305 would establish limits on the penalties that magistrate judges may impose for this contempt. Punishment could not exceed 30 days incarceration and a fine not to exceed $5,000 which is consistent with the magistrate judge's authority having for imprisonment and fines in the imposition of class C misdemeanor cases.

This provision was carefully crafted to avoid any Constitutional issue which the Department of Justice commented on in last year's bill in nonconsent cases. Since magistrate judges currently have that sentencing authority, this bill would give magistrate judges no more sentencing authority than they currently have.

The limited contempt penalties are intended to provide magistrate judges with an effective tool to impose order in courtrooms immediately when faced with disruptive behavior and at the same time distinguishing that authority from the more expansive criminal contempt power of article III judges. I know Judge Rosen is going to address that in just a minute and in a little bit more detail.

I would like also to address section 306 about the consent proceeding, and basically what this portion of the bill does is give the magistrate judges authority to hear all petty offense cases without the consent of the parties, and Judge Rosen will go into that in just a minute.

If I might take one moment, Mr. Chairman, to comment on section 405. This portion of the bill deals with authorizing Federal judges to carry firearms for the purpose of personal security. This bill would require that firearms training programs be required for each judge who chooses to carry a concealed weapon and to comply with training requirements established by the Judicial Conference of the United States. We anticipate that that would be the United States Marshal Service.

I would like to emphasize that this proposed legislation does not require judges to carry weapons or even suggest that they should. It is permissible only and leaves to the discretion of the individual judge when he or she feels that circumstances warrant carrying a weapon when they have undergone training and when they have

been threatened. Of course, a judge in most districts can do that today by having a local permit, but the problem is that Federal legislation is needed to preempt both State and local law to the extent that it would ensure that a judge who crosses out of one municipality or State to another on a daily basis not running afoul of any State or local laws in carrying the concealed weapon.

I see that my time, as I mentioned, before is completed so I that concludes my oral remarks. I would be more than happy to answer questions after the oral presentations.

Mr. COBLE. Thank you, Your Honor.

[The prepared statement of Judge Schlesinger follows:]

PREPARED STATEMENT OF HARVEY F. SCHLESINGER, JUDGE, UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

INTRODUCTION

Mr. Chairman and members of the Subcommittee, I am Harvey Schlesinger, Judge of the United States District Court for the Middle District of Florida, and Chair of the Judicial Conference Committee on Magistrate Judges. I am pleased to be here this afternoon to testify on behalf of the Judicial Conference of the United States on H.R. 1752, the "Federal Courts Improvement Act of 1999."

On behalf of the Judicial Conference, I want to thank you, Mr. Chairman, for introducing H.R. 1752, and for scheduling this hearing today.

H.R. 1752 contains forty-two separate provisions and touches upon a wide range of issues including federal court jurisdiction, the authority of judicial officers and Judicial Branch personnel and administrative programs. Of the forty-two provisions in this bill, twenty-nine passed the House last Congress in the form of H.R. 2294. I would like to express the sincere appreciation of the Judicial Conference for your continued interest in the legislative needs of the federal court system.

This bill reflects the ongoing commitment of the Judicial Conference, and the 23 committees of judges which support the Judicial Conference, to improve the effectiveness and efficiency of the federal judiciary.

With your permission, Mr. Chairman, I have included as Appendix A to this statement, an additional recommendation of the Board of the Federal Judicial Center (FJC). This proposal would eliminate the mandatory retirement age for the Director of the Federal Judicial Center. The present law requires a Director of the FJC to step down at age 70. I would hope that you can add the provision to the bill when it is considered in mark up.

I would also like to take this opportunity to comment upon H.R. 1281, a bill pending before this Subcommittee that would allow photographing, electronic recording, or televising court proceedings at the discretion of the respective appellate or district court. With regard to such media coverage of district court proceedings, the Judicial Conference in September 1994, after experimenting with and studying the effects of the presence of cameras during federal civil proceedings, determined that the potentially intimidating effect of cameras on some witnesses and jurors was cause for considerable concern. Because the paramount responsibility of a United States Judge is to guarantee citizens a right to a fair and impartial trial, the Conference concluded that it was not in the interests of justice to permit cameras in federal district courtrooms.

With regard to appellate proceedings, in March 1996 the Judicial Conference adopted a policy that allows each federal court of appeals to determine whether or not to permit such media coverage. Currently, two of the thirteen appellate courts permit such coverage of their proceedings.

This afternoon I will focus my remarks on two sections of the bill: Section 305, and Section 405. Both of these provisions were contained in H.R. 2294 when it passed the House in the last Congress.

Magistrate Judge Contempt Authority (Sec. 305)

Section 305 of the bill would expand the contempt authority of magistrate judges. As Chair of the Committee on the Administration of the Magistrate Judges System, I have a particularly strong interest in this issue. Presently, the lack of adequate contempt authority by magistrate judges undermines both the magistrate judge's and the court's authority when confronted with misconduct or failure to obey court orders.

This section of the bill would provide magistrate judges with summary criminal contempt authority to punish any misbehavior occurring in their presence. Summary criminal contempt authority is necessary to maintain order and to protect the court's dignity in response to contumacious behavior by witnesses, parties, counsel, and others present at court proceedings. The need for power to immediately vindicate the court's authority in the face of disruptive behavior exists whenever a magistrate judge presides for the district court regardless of litigant consent. Felony initial appearances under Fed. R. Crim. P. 5, detention hearings under the Bail Reform Act, 18 U.S.C. §3142, and evidentiary proceedings in case-dispositive matters under 28 U.S.C. §636(b)(1)(B) are typical examples where magistrate judges preside routinely on behalf of the district court without the litigants' consent.

The bill would also provide magistrate judges with additional criminal and civil contempt authority in civil consent cases under 28 U.S.C. §636(c) and in misdemeanor cases under 18 U.S.C. §3401. Since magistrate judges serve as the final dispositional judicial officer for the district court in these cases, this authority is necessary to enable magistrate judges to enforce compliance with the court's orders. Such authority does not constitute a significant expansion of magistrate judge authority, but provides them with a tool needed to perform effectively their existing statutory duties for the district court.

The bill would also establish limits on the penalties magistrate judges may impose for criminal contempts. Imprisonment for a summary contempt committed in the presence of the magistrate judge, or for a criminal contempt occurring in a civil consent or misdemeanor case outside the magistrate judge's presence, would not exceed 30 days incarceration (the maximum term of imprisonment for a Class C misdemeanor set forth in 18 U.S.C. §3581(b)(8), and a fine could not exceed $5,000 (the maximum fine that may be imposed on an individual for a Class C misdemeanor under 18 U.S.C. §3571(b)(6). The restricted contempt penalties are intended to provide magistrate judges with an effective tool to impose order in the courtroom that is distinguishable from the criminal contempt power of article III judges.

Potential constitutional concerns about providing magistrate judges with criminal contempt authority are resolved by placing appropriate limits on the penalties magistrate judges may impose. Limitations on penalties differentiate magistrate judge contempt authority from that of article III judges, who may impose theoretically unlimited terms of imprisonment or fines upon entities who commit contumacious acts. 18 U.S.C. §401. By contrast, this bill would impose limits on the penalties magistrate judges could order in contempt situations.

Judges' Firearms Training Program (Sec. 405)

The Judicial Conference strongly recommends the enactment of Section 405 which directly relates to the personal safety of federal judicial officers. Threats against judges, and judge's families, has risen significantly over the past ten years. The security of judges, judiciary employees, and federal courthouses is a priority matter.

Section 405 would accomplish two highly desirable goals. First, many federal judicial officers currently carry concealed firearms because of safety concerns. They do so by obtaining licenses from state and/or local authorities, as any citizen is entitled to do so. Currently, 41 States allow licensees to carry concealed firearms.

The enactment of Section 405 would mean that judges who carry firearms would effectively be required to successfully participate in a training and safety program. The Judiciary would rely on the United States Marshal Service for expertise in establishing the firearms training program. Failure on the part of judges to participate in the training program would mean such judges who carry firearms would be acting in a manner contrary to statute.

The second problem relates to the fact that judges often travel outside of their district or circuit on official, professional, or personal business. When they cross State lines, the firearms license from their home state loses its' effect. Because of this, judges in travel status often are not able to be armed. Clearly, if a judge is in danger, the fact that he or she is in one state or the other does not eliminate the danger.

Therefore, the enactment of Section 405 would provide that federal judges are, in most circumstances, exempted from state and local firearms laws and regulations. This same treatment is afforded to federal law enforcement agents and federal probations officers who

routinely carry concealed firearms and travel in interstate commerce. The proposal contained in this Bill reflects the cooperation and assistance of the Department of Justice which has worked with key federal judges to arrive at a legislative solution.

The balance of the bill is discussed below. An asterisk follow each provision which was passed as part of H.R. 2294 in the last Congress.

TITLE I—FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

Section 101—Parties' Consent to Bankruptcy Judge's Findings and Conclusions of Law

Section 157(c)(1) of title 28 of the United States Code provides that the district court may refer to a bankruptcy judge, for hearing and final determination, certain "non-core"[1] related proceedings when all parties to the proceeding consent to the referral. The present statute does not specify whether the consent must be express or whether it may be implied.

In the interest of avoiding jurisdictional controversies, the judiciary has interpreted the statute restrictively, and the Federal Rules of Bankruptcy Procedure require express consent, as set out in Bankruptcy Rules 7008(a) and 7012(b). In the absence of this consent, a bankruptcy judge is limited to filing proposed findings of fact and conclusions of law, which must be presented to a district judge for review and entry of a final order or judgment, *even when all parties agree to what the bankruptcy judge has proposed* or *when the defendant is in default*. Accordingly, the Federal Courts Study Committee in 1990 recommended enactment of an implied consent mechanism, and this principle was endorsed by the Judicial Conference in 1992.

Section 101 of the bill provides that, unless the party files a timely objection to the bankruptcy judge's proposed findings of fact and conclusions of law, that party will be deemed to have consented to them and they will become final. This proposal is intended to avoid unnecessary delay and expense to the parties, and unnecessary use of judicial resources when no issue of fact or law needs to be resolved.

TITLE II—JUDICIAL FINANCIAL ADMINISTRATION

*Section 201—Reimbursement of Judiciary for Civil and Criminal Forfeiture Expenses**

The courts must be given adequate resources to provide qualified counsel to indigent defendants pursuant to the Criminal Justice Act (CJA). In three of the past seven Fiscal Years, the CJA program has experienced budget shortfalls that led to the suspension of payments to private "panel" attorneys. Without sufficient funding to cover the basic elements of the program, the CJA's mission is jeopardized.

The use of asset forfeiture by the Department of Justice adds to the financial burden on the courts by requiring the judiciary to appoint counsel for otherwise financially secure defendants without providing compensating resources for that responsibility. When the Department of Justice seizes the assets of a defendant, that person is often left without sufficient funds to cover the costs of retaining private counsel. Consequently, the Defender Services appropriation must bear the costs of representing the defendant against criminal charges. The courts are not reimbursed.

Representation and costs are in addition to the costs of hearings conducted by the courts in processing forfeiture actions. Other entities of the federal government, or state and local governments, are reimbursed for costs related to seizures and forfeitures of assets based upon their participation in these actions. The courts receive no similar reimbursement. It would be more equitable if the expenses to the Defender Services appropriation, and those of the judiciary generally, were offset by provisions for appropriate sharing of the funds that accrue to the federal government through seized and forfeited assets. At a minimum, the judiciary should be authorized to recover the direct additional costs charged to the Defender Services appropriation when a defendant's assets are seized and legal counsel is provided at government expense. Section 201 of H.R. 2294 would authorize the reimbursement of the judiciary from the Asset Forfeiture Fund for costs arising from the forfeiture of assets of defendants. To avoid even the appearance of a conflict of interest on the part of counsel compensated from the Defender Services appropriation, the reimbursement of that appropriation would be limited to the extent to which the courts are already authorized by subsection (f) of the CJA to order reimbursement from a defendant for the costs of representation provided under the Act. We estimate that reimbursement for the costs of defense representation would be approximately $21.2 million annually.

*Section 202—Transfer of Retirement Funds**

Section 202 allows the judiciary's contributions, and accrued interest, to the Civil Service Retirement and Disability Fund to be paid back to the judiciary when bank-

[1] Altough the statue does not specifically define "non-core proceedings," courts have defined such proceedings "as those that do not involve a substantive right provided by the title 11 or that, by their very nature, generally arise outside the context of a bankruotcy case" *Diamond Mortage Corp. of I llnois* v. *Sugar*, 913 F.2d 1233, 1239 (7th Cir. 1990).

ruptcy and magistrate judges, for whom the contributions were made, elect to transfer from the Civil Service Retirement System or the Federal Employees' Retirement System to the judicial retirement system established under the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act.[2] The contributions of bankruptcy and magistrate judges to the Federal Employees' Retirement System and the Civil Service Retirement Systems, as well as the Judiciary's contributions to those systems, are paid to the Office of Personnel Management. When a judge separates from office or elects to participate in the Judicial Retirement System, the judge may withdraw his or her retirement contributions. The Judiciary's contributions are not refunded. Currently, when a bankruptcy or magistrate judge elects to transfer to the Judicial retirement system, that judge's contribution to the Civil Service Retirement System is returned. However, the judiciary's contributions made on behalf of the same judges are not returned to the judiciary. These contributions should be returned because the judiciary, not the Civil Service Retirement and Disability Fund, is responsible for paying the judges' retirement benefits if they transfer into the judicial retirement system. It is estimated that the judiciary has already contributed about $6 million to the Civil Service Retirement and Disability Fund on behalf of judges who subsequently transferred into the judicial retirement system.

*Section 203—Judiciary Information Technology Fund**

Section 203 of the bill would eliminate uncertainty created by the passage of the Information Technology Management Reform Act of 1996 (ITMRA) and repeal of the Brooks Automatic Data Processing Act. Under the ITMRA, the Office of Management and Budget was charged with management policy and oversight of information technology resources for the *executive branch* through the budget and appropriations management process. The Judiciary Information Technology Fund statute was amended to replace the requirement that procurements comply with the Brooks Act with a requirement that the procurement of information technology be conducted in compliance with "the provisions of law, policies, and regulations applicable to executive agencies under the Information Technology Management Reform Act." The potential reach of this language is so broad that it could be read to apply to many statutes with varying implications, e.g. Administrative Procedures Act, Contract Disputes Act, Small Business Act, to which the judiciary is not subject, to a single activity of the judiciary, *i.e.* procurement of information technology equipment under the Fund. Management and reporting features equivalent to those instituted under ITMRA are already in place for these resources in the judicial branch and the language added by ITMRA should be deleted. This amendment would clarify that the judiciary's Fund is not subject to laws that would not otherwise apply to the federal judiciary.

*Section 204—Bankruptcy Fees**

In 1986, Congress passed Public Law No. 99–554, 100 Stat. 3088 (1986) which authorized the Judicial Conference to establish bankruptcy administrator programs, in lieu of the U.S. Trustee program, in six judicial districts in the states of Alabama and North Carolina.

Currently, debtors in the United States trustee and bankruptcy administrator districts pay the same fees *when filing* for bankruptcy, but chapter 11 debtors in bankruptcy administrator districts are not subject to the additional *fees on quarterly disbursements* that are subsequently levied on chapter 11 debtors in United States trustee districts.

In *St. Angelo* v. *Victoria Farms, Inc.*, 38 F.3d 1524 (9th Cir. 1994), a regional United States trustee objected to the bankruptcy court's calculation of the quarterly fees to be paid by the debtor under 28 U.S.C. § 1930(a)(6). On appeal, the debtor for the first time argued that the trustee's claim should be denied because the quarterly fees do not apply uniformly in all judicial districts. The debtor argued that the bifurcated system violates the Uniformity Clause of the Constitution, which authorizes Congress to enact "uniform laws on the subject of bankruptcies throughout the United States."

The court agreed, determining that the United States trustee system is more costly for debtors than the bankruptcy administrator program and there is no legislative history justifying the difference. As indicated above, this issue was first raised on appeal. Jurisdiction over the bankruptcy administrator districts was also lacking.

At its March 1996 proceeding, the Judicial Conference determined that implementing the establishment of chapter 11 quarterly fees in the bankruptcy administrator districts would eliminate any *Victoria Farms* problem and by providing that the judiciary could retain the fees much-needed revenues could be used to offset the

[2]28 U.S.C. § 377. (Public Law No. 100-659).

cost of operating the bankruptcy administrator program. If a quarterly fee were implemented in the bankruptcy administrator districts through which the judiciary could retain the fees, any surplus exceeding the costs of the bankruptcy administrator program would be dedicated to the judiciary to offset costs of the judicial system.

Thus, the proposed language authorizes the Judicial Conference to implement fees in the bankruptcy administrator program in the judicial districts in the states of Alabama and North Carolina similar to those currently imposed by 28 U.S.C. § 1930(a)(6). In addition, the language also provides that these new fees shall be deposited into a fund established under 28 U.S.C.

§ 1931 for the operation and maintenance of the federal judiciary, including the bankruptcy administrator program.

*Section 205—Disposition of Miscellaneous Fees**

This provision responds to a directive from congressional appropriations committees that the Judiciary identify ways to increase offsetting receipts. This provision would allow the judiciary to retain any additional offsetting receipts derived from increases in miscellaneous fees charged in the federal courts of appeals, district courts, bankruptcy courts, the Court of Federal Claims, and the Judicial Panel on Multidistrict Litigation. The miscellaneous fees schedules include fees for services such as record searches, reproduction of records, and returned checks. Typically, the Judicial Conference acts to raise such fees to reflect increases in inflation. The additional amounts collected would be deposited into the special judiciary fund in the Treasury and these receipts would be available to offset funds which are appropriated by Congress for the operation and maintenance of the courts.

Section 206—Repeal of Statute Setting Court of Claims Filing Fee

By repealing section 2520 of title 28, United States Code, this provision would eliminate an unnecessary statutory requirement which has been superceded by authorization of the Judicial Conference for a miscellaneous fee schedule for the United States Court of Federal Claims.

*Section 207—Renumbering of Bankruptcy Court Fee Schedule**

This section would continue the existing structure of the Bankruptcy Court Fee Schedule by requiring that fees established prior to the enactment of the legislation establishing the judiciary fund in 28 U.S.C. § 1931, with the exception of noticing fees, be deposited into the General Treasury. This provision would retain the current structure and allow for the renumbering of the Bankruptcy Fee Schedule that is required due to the repeal of outdated fees.

Section 208—Increase in Fee for Converting a Chapter 7 or Chapter 13 Bankruptcy Case to a Chapter 11 Case.

This provision would correct the inconsistency that occurs when a petitioner files a case under chapter 7 for $175 or chapter 13 for an initial fee of $160 and then converts the case to a chapter 11 case for a conversion fee of $400. In those instances, the total amount paid ($575 and $560, respectively) is less than the $800 fee for originally filing a case under chapter 11. This section addresses that inconsistency by making the conversion fee equal to the $800 fee for originally filing a case under chapter 11.

Section 209—Increase in Chapter 9 Bankruptcy Filing Fee

This provision would increase the filing fee for filing bankruptcy petitions under chapter 9 (debt adjustment for municipalities) from $300 to the fee for filing petitions under chapter 11 (reorganization), which is $800. This increase more accurately reflects the judicial resources required to process chapter 9 cases.

*Section 210—Creation of Certifying Officers in the Judicial Branch**

This provision establishes statutory authority for the judicial branch to create certifying officers similar to those established in the executive branch under the Certification Act of 1941 (31 U.S.C. § 3528). That Act was enacted to create pecuniary liability for those officers and employees in the executive agencies whose duty it is to certify as to the propriety of a payment made through disbursing officials. These certifying officials are assigned definite responsibilities for verifying receipt of goods or services and ensuring funds are available. Certifying officials are also held personally liable for the propriety of payments which they certified. This provision will enhance financial accountability and improve the utilization of administrative resources in the judicial branch.

*Section 211—Fee Authority for Technology Resources in the Courts**

In accordance with federal policy to defray the cost of providing services by assessing a fee for their use, this section provides the judiciary with the authority to set, collect, and retain fees for the use of electronic filing, videoconferencing and electronic evidence presentation devices. These services will make courts more efficient and accessible to the bar and the public.

TITLE III—JUDICIAL PROCESS IMPROVEMENTS

Section 301—Removal of Cases Under the Employee Retirement Income Security Act

This section amends section 1445 of title 28, United States Code, to limit the removal from state court to federal court of subsection 1132(a)(1)(B) claims under the Employee Retirement Income Security Act of 1974 (ERISA). (29 U.S.C. §§ 1001–1461.) ERISA governs employee benefit plans and provides exclusive federal jurisdiction over such areas as disclosure of plan information, vesting and funding of plans, and the fiduciary role of plan administrators.

ERISA also allows participants and beneficiaries of employee benefit (e.g., health insurance and severance pay) plans to bring actions regarding the terms of these plans in either federal or state court under 1132(a)(1)(B) to: (1) recover benefits due; (2) enforce rights; or (3) clarify rights to future benefits. These actions typically involve the application of a benefit plan to a particular individual or individuals rather than present global questions of federal law arising from ERISA's complex statutory scheme.

In enacting ERISA, Congress determined those principles of ERISA law that must be decided by a federal court. However, by providing concurrent jurisdiction for claims where persons are seeking to recover benefits or enforce or clarify rights, Congress recognized that the state courts are an appropriate forum for resolution of these cases. These claims involve principles of contract and trust law—areas in which the state courts have substantial experience. Furthermore, state courts must apply the federal standards established by ERISA and are subject to appellate review by the Supreme Court.

Under current law, a plaintiff is allowed to choose for these claims a state or federal forum, whichever will be more convenient and less costly. Section 301 would provide that once filed in state court, the case would not be subject to removal solely on the basis of section 1132(a)(1)(B). Removal, nonetheless, is possible if the suit includes not only an 1132(a)(1)(B) claim, but another transactionally related claim having a jurisdictional basis for a federal forum. Also, if the plaintiff and defendant have diversity of citizenship and the threshold amount in controversy is met, the defendant would have the right to pursue the case in federal court.

During the twelve-month period ending September 30, 1998, 9,609 ERISA cases were filed in federal district court (119 with the United States as the plaintiff, 33 with the United States as the defendant, and 9,457 filed under federal question jurisdiction (U.S. Government not a party)). Of the 9,609 ERISA cases filed in the federal district courts last year, 2,307 were removed from state court. Although it is unknown how many of these cases were removed based solely upon subsection 1132(a)(1)(B), enactment of this amendment will certainly ease the federal civil docket.

Section 302—Elimination of In-State Plaintiff Diversity Jurisdiction

Section 302 would repeal in-state plaintiff (ISP) diversity jurisdiction. In-state plaintiff diversity jurisdiction allows a plaintiff to litigate in federal court a civil claim based on state law, even though the plaintiff is a citizen of the state whose court system the plaintiff seeks to avoid. There appears to be no federal interest in providing a forum for enforcing rights under state law when the plaintiff is a citizen of the state in which suit is brought. Section 302 pertains only to one type of diversity jurisdiction, namely ISP, and has a limited effect on the general scope of diversity jurisdiction.

In-state plaintiff diversity jurisdiction was first created by Congress in 1789 as part of the Judiciary Act's creation of the federal court system. At that time Congress permitted federal diversity jurisdiction to be invoked by an in-state plaintiff while forbidding removal to federal court by an in-state defendant. The basis for such jurisdiction demonstrates that the original justification for ISP diversity jurisdiction has entirely disappeared.

Congress had particular reasons in 1789 for treating in-state defendants and in-state plaintiffs differently in their access to general diversity jurisdiction. The original purpose of general diversity jurisdiction was to provide a neutral federal forum for resolution of interstate commercial controversies. The national problem of impairment of credit provided ample justification for giving a creditor, who would have

been the plaintiff, the right to enforce a substantial debt in federal court whenever diversity of citizenship existed. In 1789 there was a genuine danger that state courts would disrupt the national economy and the rule of law by systematically favoring two distinct classes of litigants: home-state citizens and anyone resisting the payment of a debt. Because there was no reason for Congress to fear state court prejudice against debtors, as opposed to creditors, it was logical for the First Congress to grant the right to invoke federal diversity jurisdiction by removal only to out-of-state defendants and to provide in-state plaintiffs with the alternative forum of a federal court.

Whatever arguments may justify retaining general diversity jurisdiction in light of modern conditions in state and federal courts, the historical reasons for supplementing general diversity jurisdiction with ISP diversity jurisdiction have completely disappeared. It is difficult to argue today that in-state plaintiffs require access to federal diversity jurisdiction because state courts are systematically biased in favor of defendants in the adjudication of state-law claims or that state courts are systematically under enforcing state-created rights. Repeal of ISP diversity jurisdiction is compatible with the arguments advanced in favor of general diversity jurisdiction, including the retention of the rights of removal by out-of-state defendants as a protection against whatever local bias they may encounter when sued in state court by in-state plaintiffs.

In 1998, there were 51,992 diversity cases filed in the federal courts. Of that number, 13,517 were ISP diversity cases, which was 26 percent of all new diversity cases filed in 1998. Last year, this would have been the maximum number of cases affected by the repeal of this one type of jurisdiction.

The decrease in filings, however, could be expected to be less than this amount because two alternative routes will continue to exist for filing such diversity cases in federal court. First, a diverse defendant sued in state court by an in-state plaintiff retains the right to remove that case to federal court. Second, a plaintiff who would be barred by the proposed repeal of ISP diversity jurisdiction from filing a diversity case in his or her home state retains the right, if the plaintiff so chooses, to file that case in a federal court in any other state in which the defendant is subject to personal jurisdiction. Under that scenario, the plaintiff would then proceed under the substantive law of the state in which the case is filed.

Thus, the continued availability of these two alternative avenues for invoking federal diversity jurisdiction make it difficult to assess accurately the caseload impact of repealing ISP diversity jurisdiction. However, weighing the above factors, it is estimated that enactment of section 302 would reduce the federal civil case filings by approximately 6,700 per year—about half of the number of ISP cases now filed.

Repeal of ISP diversity jurisdiction, therefore, would assist the federal courts in meeting the needs of contemporary plaintiffs who seek judicial enforcement of the rights conferred on them by federal law and ensuring that scarce judicial resources are used wisely. The historical justification for ISP diversity jurisdiction simply no longer exists, and a fair forum would continue to be available to in-state plaintiffs if such jurisdiction were abolished. The amendment in this section is a conservative proposal and would promote sound judicial administration.

*Section 303—Extension of Statutory Authority for Magistrate Judge Positions to be Established in the District Courts of Guam and the Northern Mariana Islands**

The Federal Magistrates Act, 28 U.S.C. §§631–639, as amended, does not apply to the district courts of Guam or the Northern Mariana Islands. Under the Act, magistrate judge positions in other federal district courts are established, adjusted, and eliminated by the Judicial Conference of the United States in response to changing needs. The proposed amendment would

allow the Conference to establish magistrate judge positions, if warranted, in Guam and the Northern Mariana Islands.

Current circumstances illustrate the importance of the proposed amendment. The Judicial Conference determined in 1994 that the district court of Guam had developed a need for the services of a part-time magistrate judge (compensated at $21,115 per annum under the applicable salary schedule). The district judge of that court, working alone, must frequently interrupt his scheduled trials to perform felony preliminary proceedings. The efficiency of the court would be enhanced if a magistrate judge were available to perform these functions, which include initial appearances, detention hearings, arraignments, and review of search and arrest warrant applications.

The proposed amendment includes the Northern Mariana Islands to avoid the need for another statutory change when and if the caseload of that jurisdiction develops to a level warranting the assistance of a magistrate judge.

Section 304—Bankruptcy Administrator Authority to Appoint Trustees, Examiners, and Committee of Creditors

This section provides statutory authority for bankruptcy administrators in Alabama and North Carolina to appoint bankruptcy case trustees, standing trustees, examiners, and committees of creditors and equity security holders, as is done in the rest of the country by United States trustees. Experience with the bankruptcy administrator program established in the judicial districts in Alabama and North Carolina pursuant to section 302(d)(3) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, has shown that it would be desirable to have bankruptcy administrators make these appointments and fix standing trustees' compensation and percentage fees. Acting pursuant to regulations adopted by the Judicial Conference of the United States and guidelines promulgated by the Director of the Administrative Office of the United States Courts, bankruptcy administrators currently make recommendations to the court on these matters.

Authorizing bankruptcy administrators to make these appointments and fix standing trustees' compensation and percentage fees directly would further one of the central goals of the Bankruptcy Reform Act of 1978, Public Law No. 95–598, freeing bankruptcy judges from an administrative role in their cases. Although the 1986 Act authorized United States trustees to perform these functions, it did not specifically authorize bankruptcy administrators to do so even though the two officials have similar roles in overseeing the administration of estates and supervising trustees and other fiduciaries in bankruptcy cases. This amendment would give bankruptcy administrators authority that is comparable to that of trustees.

*Section 306—Consent to Magistrate Judge Authority in Petty Offense Cases and Magistrate Judge Authority in Misdemeanor Cases Involving Juvenile Defendants**

Under 28 U.S.C. §636(a) and 18 U.S.C. §3401(b) and (g), United States magistrate judges may try petty offense cases that are Class B misdemeanors charging a motor vehicle offense, Class C misdemeanors, and infractions, without the consent of the defendant. Prior to the enactment of the Federal Courts Improvement Act of 1996 (Public Law No. 104–317, 110 Stat. 3847 (October 19, 1996)), magistrate judges were not able to try any misdemeanor or petty offense case unless the defendant consented to be tried before the magistrate judge and specifically waived the right to be tried by a district judge. The Federal Courts Improvement Act of 1996 eliminated this requirement in Class B misdemeanors charging a motor vehicle offense, Class C misdemeanors, and infractions. This new section removes the consent requirement in all other petty offense cases.

A large number of the petty offense cases heard by magistrate judges are not exempt from the current consent requirement. These cases include hunting and fishing violations on wildlife refuges (18 U.S.C. §41) and any trespass, assault, or theft which occurs under regulations governing conduct on property controlled by the Department of Veterans Affairs (38 C.F.R. §1.218 *et. seq.*), The National Park Service (36 C.F.R. §1.3 *et. seq.*), or military bases (18 U.S.C. §1382).

These types of non-exempted cases can be as simple as fishing with two poles or having an unleashed dog in a National Park.

This section would also enhance the efficiency of the courts by simplifying the procedure for obtaining consent from defendants charged with petty offenses. Under current law, a magistrate judge must determine whether the charge against a defendant is one of the types of cases exempted from the consent requirement. Magistrate judges report that this process can be time consuming because they often hear more than 50 petty offense cases in one day. A magistrate judge is required to admonish certain defendants that they have a right to an article III judge and others that they do not have this right. This section would simplify this confusing procedure.

These amendments would improve judicial efficiency by also permitting magistrate judges to preside over all misdemeanor cases, including Class A misdemeanor cases, that involve

juvenile defendants, and by providing them with the authority to sentence juvenile defendants to terms of imprisonment in petty offense and misdemeanor cases.

In 1968, 18 U.S.C. §3401 was amended as part of the enactment of the Federal Magistrates Act. The new Act gave magistrate judges "jurisdiction to try persons accused of, and sentence persons convicted of, minor offenses committed within that judicial district." 18 U.S.C. §3401(a) (1970). The term "minor offenses" was defined as "misdemeanors punishable under the laws of the United States, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than $1,000, or both . . ." 18 U.S.C. §3401(f) (1970). Section 3401 did not distinguish juvenile defendants or youth offenders. At that time, however, the Juvenile

Delinquency Act, 18 U.S.C. §5031 *et seq., gave jurisdiction over juvenile defendants exclusively to article III judges.*

The federal courts have now had more than 25 years of experience with the federal magistrate judges system. Magistrate judges now try and sentence almost all adult federal misdemeanor defendants. In Class B misdemeanors involving a motor vehicle offense, Class C misdemeanors, and infractions, the requirement that a defendant, either adult or juvenile, must consent to the jurisdiction of a magistrate judge has been eliminated. *See* Federal Courts Improvement Act of 1996, Public Law No. 104–317, 110 Stat. 3847 (October 19, 1996). Moreover, with the 1984 enactment of the Bail Reform Act, 18 U.S.C. §3141 *et seq.,* magistrate judges began exercising broad authority to order the pretrial detention of criminal defendants, sometimes for extended periods of time.

Under the Juvenile Delinquency Act , magistrate judges have the authority to detain juvenile defendants before trial. *See* 18 U.S.C. §5034 and 5035. This results in a curious paradox: magistrate judges may order the pretrial detention of juvenile defendants who have committed felonies, yet are forbidden to sentence a juvenile to even a minimal prison sentence for committing a petty offense. Under the current system, magistrate judges may not even punish a juvenile defendant who violates a probation or a supervised release term, except to impose an additional term of probation or supervised release. Under these circumstances, it is appropriate to give magistrate judges the authority to impose sentences of imprisonment upon juvenile defendants in misdemeanor cases.

*Section 307—Savings and Loan Data Reporting Requirements**

After Congress amended Title 28 in 1990 to require this report, the Administrative Office

decided not to duplicate the collection efforts of the Department of Justice and the Federal Deposit Insurance Corporation (FDIC) but to obtain the data from those two agencies and to transmit that data to Congress in *Judicial Business of the United States Courts,* which is transmitted under 28 U.S.C. §604(a)(4).

The number of savings and loan (S&L) cases peaked in 1992, and major S&L cases are now a small proportion of cases in federal courts. This past year, criminal S&L case filings dropped to 17 major cases brought against as many defendants by U.S. Attorneys. This information is readily available from the Department of Justice and the FDIC should the Congress need it. However, because these cases make up such a small percentage of the caseload of the

federal courts this report should be eliminated so that staff of the Administrative Office can focus their analytic efforts on the most significant aspects of the federal courts' caseload.

*Section 308—Place of Holding Court in the Eastern District of Texas**

This amendment would implement the March 1991 Judicial Conference proposal to designate Plano, Texas as a place of holding court in the Eastern District of Texas. In addition, the provision clarifies that court for the Eastern District of Texas and the Western District of Arkansas may be held anywhere in the Federal Courthouse which sits astride the Texas-Arkansas state line.

*Section 309—Federal Substance Abuse Treatment Program Reauthorization**

The Federal Substance Abuse Treatment program was created in the Contract Services for Drug Dependent Federal Offenders Treatment Act of 1978 (Public Law No. 95–537, October 27, 1978). The proposal in section 103 would reauthorize appropriations for Fiscal Year 1999 and subsequent years "such sums as may be necessary to carry out" the drug and alcohol aftercare program for federal offenders administered by the Federal Corrections and Supervision Division of the Administrative Office of the United States Courts pursuant to the authority granted the Director of the Administrative Office under 18 U.S.C. §3672.

This amendment would eliminate the necessity for repetitive enactment of bills to reauthorize appropriations for this important program in favor of a permanent reauthorization. The program has operated under the judiciary appropriations bill without a reauthorization in Fiscal Years 1993, 1994, 1995, 1996, 1997, 1998 and 1999.

Section 310—Multidistrict Litigation

This section, entitled the Multidistrict Trial Jurisdiction Act of 1999, amends section 1407 of title 28, United States Code, to allow a transferee judge to retain cases for trial or transfer those cases to another judicial district for trial in the interest of justice and for the convenience of parties and witnesses. This amendment provides transferee judges the needed flexibility to resolve multidistrict cases as expeditiously and fairly as possible.

Currently, section 1407(a) authorizes the Judicial Panel on Multidistrict Litigation to transfer related cases, pending in multiple federal judicial districts, to a single district for coordinated or consolidated pretrial proceedings. Such transfer is based on the Panel's determination that centralizing those cases will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the cases. Section 1407(a) also requires the Panel to remand each transferred case to its original district at or before the conclusion of the pretrial proceedings, unless the case is previously terminated in the transferee court.

For nearly 30 years, federal courts had followed the practice of allowing a transferee court to invoke the venue transfer provisions (28 U.S.C. § 1404) and transfer the case to itself for trial purposes. The Supreme Court reversed that practice in *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26 (1998), stating that such self-assignment transfer power did not exist under section 1407. Now, even if all parties to a case agree on the wisdom of self-transfer for trial, the Panel must remand the cases to their transferor districts and then have each original district court decide whether to transfer each case back to the transferee district for trial—a costly, inefficient, and time-consuming process.

This section seeks to restore the power of the transferee judge to retain cases for trial or to transfer such cases to another district for trial. Self-transfer for trial is not to a distant, unfamiliar forum, but to one where the parties and the transferee judge are already familiar through the ongoing pretrial proceedings. In addition, the ability to set a trial date historically has provided a powerful inducement for the resolution of such cases through global or individual settlements. This section will, in essence, restore the trial-setting authority previously utilized in multidistrict litigation.

*Section 311—Membership in Circuit Judicial Councils**

This section amends section 332(a) of title 28, United States Code, to provide participation of senior judges in the federal judiciary's internal governance process at the regional (i.e., judicial circuit) level. The Judicial Conference requests this legislation in accordance with Recommendation 50 of the *Long Range Plan for the Federal Courts,* which encourages "broad, meaningful participation of judges in governance activities at all levels" and specifically identifies the need to establish the eligibility of senior circuit and district judges to serve as members of the circuit judicial councils (Implementation Strategy 50b(3)).

Each of the 12 regional judicial circuits has a circuit judicial council responsible for exercising general administrative oversight of the courts within the circuit. These judicial councils consist of the chief judge of the circuit, who presides, plus equal numbers (which vary from circuit to circuit) of other circuit judges and district judges from the circuit. Section 332(a)(3) of title 28 presently limits council membership to circuit judges and district judges "in regular active service." Senior judges have substantial judicial and, in many instances, administrative experience that can inform and enhance decision making on the many issues that come before the circuit councils. This legislation would provide the judges of each circuit with the option of including one or more senior judges among council members as they deem appropriate. This change would not alter the eligibility requirements for serving as chief judge of the circuit. The Federal Courts Improvement Act enacted in the 104th Congress (Public Law No. 104–317, § 601, 110 Stat. 3847, 3857) included similar provisions that authorized or clarified senior judge eligibility for service on the Judicial Conference and the Board of the Federal Judicial Center.

*Section 312—Sunset of Civil Justice Expense and Delay Reduction Plans**

Section 2 of Public Law No. 105–53 entitled "Enhancement of judicial information dissemination," amended the sunset provision in section 103(b)(2) of the Civil Justice Reform Act of 1990 (CJRA) to leave only "sections 472, 473, 474, 475, and 478" of title 28, United States Code, subject to the December 1, 1997, sunset. These code sections set forth the standards for development and implementation of the CJRA plans, and also provided for review of the plans by the chief circuit judge and chief district judge, periodic assessment of the plans, and development of a model plan by the Judicial Conference.

Omitted from the sunset provision were sections 471 and 476. Section 476, also entitled "Enhancement of judicial information dissemination," requires the semi-annual reporting of civil cases pending over three years and motions pending over six months. The introductory remarks for Senator Biden's amendment to S. 996, the bill that became Public Law No. 105–53, make it clear that only section 476 was to be retained:

> My amendment to S. 996 would make permanent one very successful reform from the Civil Justice Reform Act—the requirement that a list of each Federal

judge's six-month-old motions and three-year-old cases be published and disseminated twice each year.

According to the Rand Institute for Civil Justice, this public reporting requirement [was effective in reducing delay]. This very effective reporting requirement will expire in December [1997] unless Congress acts. With my amendment, I seek to extend this reporting requirement.

143 Cong. Rec. S8528–01 (daily ed. July 31, 1997).

Beyond the omission of 28 U.S.C. § 471 from the sunset provision, there is nothing in the legislative history or in Public Law No. 105-53 itself to suggest that the amendment was intended to extend any provision of the CJRA besides section 476. The continuation of section 471 is inconsistent with the expiration of the six code sections that define the substantive and procedural standards of the CJRA plan program. There are no other remaining provisions in chapter 23 of title 28 that deal with CJRA plans; therefore, literal fulfillment of section 471 is now impossible. It can be concluded that the failure to retain 28 U.S.C. § 471 in the sunset provision was inadvertent. This technical amendment to reinstate section 471 in the sunset provision is therefore necessary.

*Section 313—Technical Bankruptcy Correction**

Title 11, United States Code, section 1228 contains incorrect cross references to 11 U.S.C. § 1222(b)(10). Those references should be to 11 U.S.C. § 1222(b)(9). Section 1228 provides for the discharge of debt in chapter 12 bankruptcies. Under that provision, as soon as the debtor completes all payments under the debtor's plan, debt will generally be discharged, subject to a few, limited exceptions. One obvious exception covers certain payments that, under the plan, will necessarily extend beyond the period of the plan. It simply makes sense that, where the plan contemplates payments to be made beyond the period of the plan, the debt will not be discharged at the close of the plan period.

The exception currently refers to subsections 1222(b)(5) and 1222(b)(10), which appear in that section of chapter 12 governing the contents of the plan. The reference to subsection 1222(b)(1) is plainly in error, however, and should be to subsection 1222(b)(9). Subsections 1222(b)(5) and 1222(b)(9) both concern debts on which payments are due following completion of the plan. Subsection 1222(b)(10), however, concerns something entirely different: the vesting of property in the debtor or another entity. The current cites to subsection 1222(b)(10) should be to 1222(b)(9). The bill corrects those errors.

TITLE IV—JUDICIARY PERSONNEL ADMINISTRATION, BENEFITS, AND PROTECTIONS

Section 401—Judicial Retirement Matters

Federal circuit and district judges may serve for life and are entitled to their compensation for life. This Constitutional arrangement insulates the judiciary from any form of political pressure. But an inequity exists for those who become federal judges before age 50. Under present law, life-tenured judges may not retire from regular active service or take senior status until they reach age 65 with a minimum 15 years in service. This requirement is commonly known as the "rule of 80" because its age and service requirements must add up to 80.

Section 401 modifies the "rule of 80" to permit a judge with 20 years in service who has reached age 60 to take senior status. This modification would not affect the requirements for a judge to retire from office. The minimum age for a judge's retirement to vest would remain age 65 with at least 15 years of service. Section 401 applies only to transfers to senior status.

It seems to us unfair that a judge who serves on the bench for many years but must leave the judiciary prior to the time he or she reaches age 65 would have no vested interest in any retirement income and would receive nothing in the way of benefits from those years that he or she served. Judges are alone among Federal employees in this respect.

Revision of the current "rule of 80" would also increase the flexibility of the judiciary and Congress in dealing with periodic imbalances of caseloads by increasing the numbers of senior judges who are readily available to accept temporary reassignment to other courts. By definition, senior judges are very experienced members of the court and a valuable resource. Senior judges can be assigned to sit on a court where there are special problems that can be solved by the immediate availability of a seasoned judge, such as emergencies caused by illness or districts with persistent unfilled judicial vacancies and significant case backlogs. The judiciary is constantly seeking ways to handle its caseloads more efficiently, and a greater pool of senior judges is one way to add resources without changing the total number of judgeships authorized by law.

A judge who takes senior status continues to receive the salary of the office and continues to perform judicial duties. In order to continue receiving the full salary of the office, which includes adjustments to salary that are not cost-of-living adjustments, a senior judge must perform judicial duties equivalent to at least 25 percent of the workload of an average active judge. The vast majority of senior judges choose to provide valuable and irreplaceable service. For the 12 month period ending September 30, 1995, senior judges accounted for about 17 percent of all appellate participations and about 19 percent of all trials. These totals are equivalent to the annual services of almost 100 active judges.

*Section 402—Disability Retirement and Cost-of-Living Adjustment of Annuities for Territorial Judges**

Section 402 provides parity for the four territorial judges by giving them similar retirement benefits to those of bankruptcy judges, magistrate judges, and Court of Federal Claims judges.

Currently, the judges of the district courts in Guam, the Northern Mariana Islands, and the Virgin Islands are nominated by the President and, after confirmation by the Senate, serve for 10-year terms. Since these judges do not enjoy lifetime tenure and salary protection under article III of the Constitution, they are not "judges of the United States" eligible to retire under sections 371 and 372 of title 28, United States Code. Instead, their retirement rights and benefits are set forth in section 373 of that title.

A territorial district judge may retire from office (a) after meeting the same "Rule of 80" age and service requirements applicable to article III judges, (b) if removed by the President solely on grounds of mental or physical disability after serving at least 10 years, or (c) if not reappointed at the end of a term. An annuity equal to the pre-retirement salary (prorated, in cases of disability or failure of reappointment, for judges with less than 15 years of service) is payable beginning at the time of retirement or upon attaining age 65, whichever is later. For judges who retire under the "Rule of 80," the annuity is subject to the same cost-of-living adjustment as annuities payable under the Civil Service Retirement System, provided that such adjustment cannot result in a total annuity greater than 95 percent of an article III district judge's salary.

In two key respects, the retirement arrangements for territorial district judges under section 373 compare unfavorably with analogous arrangement for bankruptcy judges, magistrate judges, and judges of the Court of Federal Claims (see 28 U.S.C. §§178;377): (1) territorial judges cannot retire on disability grounds before completing 10 years of service (as compared with 5 years for other non-article III judges) and, even then, no annuity is payable until age 65 (no age restriction for other judges);[3] and (2) territorial judges are not afforded cost-of-living adjustments in their retirement annuities unless they retire under the "rule of 80" (*i.e.*, no adjustment for disabled judges or judges who are not reappointed), and even then, any adjustment must wait until active judge salaries have increased to the point that the retired judge's annuity is less than 95 percent of an active judge's salary.[4]

*Section 403—Federal Judicial Center Personnel Matters**

This provision corrects an inequity which exists between the Federal Judicial Center and every other agency of the government, including the Administrative Office of the United States Courts. The Center's 1967 statute limits maximum compensation of Center staff (other than the Director and Deputy Director) to that equal to Executive Schedule level V. Although the Center for most of its history was essentially at statutory parity with the Administrative Office, changes to the Administrative Office personnel statute have placed the Center at a recruitment disadvantage with respect to the Administrative Office, as well as the Executive Branch. Authorizing Executive Schedule level IV compensation for five percent of the Center's staff could reach up to eight persons, but the Center intends to use this authority only for its five division directors. The Center is fully prepared to absorb the very modest

[3] Strictly speaking, territorial district judges, unlike other Federal judges, cannot voluntarily "retire" for disability. To receive a retirement annuity, a disabled territorial judge must seek to be removed from office by the President solely on that ground. 28 U.S.C. §373(e).

[4] By contrast, all retired bankruptcy judges and magistrate judges are afforded cost-of-living adjustments so long as the total annuity does not exceed 100 percent of an active bankruptcy or magistrate judge's salary, see 28 U.S.C. §377(e), and Court of Federal Claims judges who retire under section 178 of title 28 are guaranteed an annuity based on the full salary payable to active judges of that court. The 95-percent limitation on cost-of-living adjustments for retired territorial district judges is peculiar inasmuch as territorial judges in regular active service have received the same salary as the article III district judges for the past 40 years or more but the provision for cost-of-living adjustments was added to section 373 only 19 years ago.

cost increment. The Board of the Federal Judicial Center has approved the amendment.

*Section 404—Judicial Administrative Officials Retirement Matters**

Section 404 provides for a greater degree of equity and parity in crediting prior service in the Legislative Branch for purposes of retirement by the Director of the Administrative Office, the Director of the Federal Judicial Center and the Administrative Assistant to the Chief Justice. These officials currently may receive a maximum of five years of retirement credit for prior service in any civilian presidential appointment in the Executive Branch requiring Senate confirmation, but they may receive credit for prior service in the Legislative Branch only as a Member of Congress.

Section 404 allows credit for prior Legislative Branch service of a comparable rank and responsibility to the Executive Branch service that is currently creditable. Credit would be allowed to a primary administrative assistant to a Member of Congress or as staff director or chief counsel for a committee or subcommittee. Although section 404 limits congressional service credit to high-level positions, it further requires that the person serving in the position have served in that capacity for at least five years or at a salary that is within the top 10 percent of salaries for congressional staff at the time of the service.

Section 406—Deletion of Automatic Excuse from Jury Service for Members of the Armed Services, Members of Fire and Police Departments, and Public Officials (Changed in part)*

This section repeals the automatic excuse from service now granted to members of the Armed Forces, members of fire and police departments, and public officials under 28 U.S.C. §1863(b)(6). These exemptions were established in 1948 on the assumption that it would be a waste of time to include on juries persons whose jobs affect public health, safety, or welfare. More recent experience has indicated, however, that many individuals who fall within the scope of these exemptions could easily serve, such as police or fire officials who work on compressed time shifts. The same is true for the "public officer" exception, which bars service from elected or appointed officials such as school board officials, state legislators, as well as secretaries and clerks appointed by locally elected officials.

Circumstances in the Armed Forces have also changed in the last decade so that military personnel have more flexibility to accommodate jury service without interfering with their official duties. According to the National Center for State Courts, 24 states and the District of Columbia currently have no exemptions from jury service at all. Of the 27 states with exemptions, only ten states exempt active military members.

It should be noted that the Department of Defense can currently authorize the exemption of members of the Armed Services from state and local jury service, and this amendment would expand this authorized exemption to federal jury service. Title 10, U.S.C. §982 specifies that members on active military duty may not be required to serve on a state or local jury if the Department of Defense determines that such service would "unreasonably interfere" with their military duties or would "adversely affect the readiness" of their unit or command. This provision amends 10 U.S.C. §982 to include federal jury service with state and local jury service. Regulations on the administration of this section are prescribed in 32 C.F.R. §144.6, and state that service members who fall within these determinations are exempt from jury duty.

*Section 407—Expanded Workers' Compensation Coverage for Jurors**

Section 407 extends Federal Employees' Compensation Act (FECA) coverage (workers' compensation) to persons summoned for jury duty in the federal courts, while they are traveling to or from court. Although claims by commuting jurors have not arisen frequently, they do occur. The Department of Labor, which administers FECA, denied compensation to a special grand juror in the District of Maryland who was injured while en route from her home to the courthouse.[5] Although it is unknown whether the individual in that case had insurance protection, some jurors may well be financially unprotected while traveling to and from the court.

Jurors appear in court under compulsion of law; they are not free to decline to come to court at the time and place directed. The fact that they might have to travel a long distance—often across an entire judicial district—or suffer significant inconvenience in so doing does not relieve them of this legal obligation. Additionally,

[5] The Department of Labor reasoned that a juror is not covered while traveling to and from his or her home. Department of Labor File No. A25–316984.

while regular employees must bear their own travel costs, the Jury Act at section 1871(c) provides that jurors shall receive mileage reimbursement for their expenses of commuting to and from the courthouse, as well as reimbursement of toll charges and (in the discretion of the court) parking expenses. Thus, as a matter of law, the Jury Act can be viewed as providing that jury service begins "when a juror steps out of his or her door." Statutory consistency suggests that FECA coverage be in accord.

The number of occasions on which FECA claims will be filed by commuting jurors cannot be estimated with any precision, but the number will be small. The dollar value of benefits provided by the Labor Department in FECA claim awards likewise will be insignificant because the Jury Act at section 1877(b)(1) deems jurors to be paid at the rate of GS–2 of the General Schedule.

*Section 408—Property Damage, Theft, and Loss Claims of Jurors**

Section 408 authorizes the Director of the Administrative Office of the United States Courts to compensate jurors and prospective jurors for their personal property when it is lost or damaged during their official service. At present, the only means available to compensate jurors for personal property that may be damaged, lost, or stolen in the course of their official service is an administrative claim under the Federal Tort Claims Act,[6] which requires the head of an agency to find that some agency employee negligently caused the loss. Evidence of such negligence is almost always speculative, or nonexistent, compounding the time it takes to conduct any kind of investigation. Furthermore, it is often unclear to which agency's employee the supposed negligence should be attributed—for example, the court, the United States Marshal, or the General Services Administration. The items lost by jurors tend to be everyday things such as overcoats, wallets, and pocketbooks. Considering the importance of jurors to the functioning of the court system and the burden of service they assume, it is in the interest of the United States to establish a fast, effective means of compensating them for these losses in appropriate circumstances.

This amendment grants the Director authority equivalent to that by which federal employees may be compensated under the Military Personnel and Civilian Employees' Claims Act.[7] That statute does not require a finding of negligence; it simply requires a determination that the claimant was not at fault. Extension of this authority is consistent with the provision of other employee-like benefits and protection to jurors in recognition of the value of their public service—for example, travel expenses and subsistence allowances, [8] and on-the-job injury benefits under the Federal Employees' Compensation Act.[9] The cost of paying claims under this amendment is likely to be negligible.

Section 409—Elimination of the Public Drawing Requirements for Selection of Juror Wheels

This section eliminates the noticing and public drawing requirements for selecting names from jury wheels. The Jury Act at 28 U.S.C. §§ 1864(a) and 1866(a) currently states that the clerk shall "publicly draw at random," from the names of persons required for jury service. "Publicly draw" is defined in 28 U.S.C. § 1869(k) as a "drawing which is conducted . . . after reasonable public notice and which is open to the public." Because computers have replaced the physical drawing of names, and because the public has little or no interest in attending a jury drawing, this section would eliminate the requirement to post a separate notice for each drawing from the master and qualified wheels, as well as the requirement to draw names publicly and/or to post public notices. Instead, one general notice will be posted in the clerk's office that explains the process by which names are randomly and periodically drawn from the wheels.

The Jury System Improvements Act of 1978, Public Law No. 95–572, authorized the Judicial Conference to adopt regulations governing the drawing of juror names from the jury wheels when a drawing is made by electronic data processing. Accordingly, the Conference has adopted regulations that take into account the changes in jury selection resulting from technological advances. The Conference regulations narrowed the meaning of "public drawing" to apply only to the selection of the starting number and interval (quotient) during the process of selecting juror names from the original source lists. The Conference did not require any public observance of the actual computer operations, interpreting the term "reasonable public notice" to

[6] 28 U.S.C. § 2671–2680.
[7] 31 U.S.C. § 3721.
[8] 28 U.S.C. § 1871.
[9] 28 U.S.C. § 1877j; 5 U.S.C. §§ 8101 *et seq.*

mean the posting of a written announcement of the drawing from the master and qualified wheels on a bulletin board or another public place at the courthouse.

With advanced computer technology, more courts are moving to a purely randomized method for selecting juries. And, the Administrative Office's new Jury Management System for the courts will perform the selection of names from the master and qualified jury wheels by a purely randomized process approved by the National Institute of Standards and Technology.

*Section 410—Annual Leave Limit for Court Unit Executives**

This amendment permits the Judicial Conference to designate certain positions within the judiciary as "court unit executive positions" for purposes of permitting those officials to accumulate and carry over up to 90 days of annual leave from one year to the next. At present, the Leave Act[10] prohibits these court officials from carrying over more than 30 days of leave. In contrast, senior executives in the Executive Branch and Administrative Office may carry over up to 90 days of annual leave from year-to-year. Thus, this change will enable the courts to remain competitive with other government agencies in hiring and retaining top executives.

This provision will affect approximately 294 officials, including circuit executives, clerks of courts of appeals, district court clerks, district court executives, bankruptcy court clerks, clerk of the Court of International Trade, clerk of the United States Court of Federal Claims, chief probation officers, chief pretrial services officers, senior staff attorneys, chief preargument attorneys, bankruptcy administrators, and circuit librarians.

*Section 411—Payments to Military Survivor Benefit Plans**

This section addresses an inequity in the treatment of regular active article III judges who are military retirees. These judges, unlike other former military retirees employed by the federal government, do not have contributions made to the Military Survivor Benefit Plan (MSBP) on their behalf from the military retirement fund, as is provided under the Dual Compensation Act.

5 U.S.C. §5532(c)(2)(B). This amendment corrects this inequity by entitling article III judges to have contributions made to the MSBP on their behalf from the military retirement fund even though they are ineligible to receive retired pay from that fund while in regular active service.

In pertinent part, section 371(e) of title 28 states that "[n]otwithstanding subsection (c) of section 5532 of title 5, United States Code, retired pay for a former member of a uniformed service who . . . becomes employed as a justice or judge of the United States . . . shall not be paid during regular active service as a justice or judge but shall be resumed or commenced without reduction upon retirement from the judicial office or from regular active service (into senior status)." *See* Public Law No. 100–702, Sec. 1005, 102 Stat. 466 (1988). Before this provision was enacted the retired pay of all military retirees in federal civilian service (including article III judges) was subject to reduction in accordance with the offset requirements of the Dual Compensation Act. 5 U.S.C. §5532(b)(c). Under that statute, the military retired pay due a federal employee whose salary equals or exceeds Level V of the Executive Schedule (currently $108,200 per annum) is reduced to zero, with the amount otherwise payable transferred to the general fund of the Treasury, except that the retired pay cannot be "reduced to an amount less than the amount deducted . . . as a result of participation in any survivor's benefits in connection with the retired or retainer pay or veterans insurance programs." 5 U.S.C. §5532(c)(2)(B). Based on that exception, contributions to the MSBP or similar survivor benefits plans are subtracted from an individual's retired pay before the balance is returned to the Treasury. As a result, most military retirees employed by the federal government are still generally entitled to have their survivor benefit contributions paid from the military retirement fund even though they cannot receive any money directly from that fund.

In contrast, the Comptroller General has construed section 371(e) to require article III judges to make contributions *directly* to the Survivor Benefit Plan until they retire from the judicial office or take senior status. *Matter of Major General Ira Dement III, USAFR (Retired),* B–252391 (Comp. Gen. Oct. 22, 1993) (holding that 28 U.S.C. §371(e) removed retired pay received by judges from the coverage of 5 U.S.C. §5532, with the result that the limit on reductions to military pay in section 5532(c)(2)(B) is no longer available). This amendment corrects this outcome and provides for parity in the treatment of military retirees.

[10] 5 U.S.C. §6301 *et seq.*

Section 412—Authorization for a Circuit Executive for the Federal Circuit

Section 412 of the bill adds a new subsection (h) to section 332 of title 28, United States Code, to permit the United States Court of Appeals for the Federal Circuit to appoint a circuit executive. All other courts of appeals have a circuit judicial council established under section 331 of title 28, and the judicial councils have authority under section 332 to appoint a circuit executive. The Federal Circuit, in contrast, does not have a judicial council that would have authority to appoint a circuit executive. The new subsection treats the Federal Circuit in the same manner as all other courts of appeals with respect to appointment and delegation of duties to a circuit executive, except that the duties performed by the judicial councils in other circuits will be performed by the court itself. Although the Federal Circuit differs from the other courts of appeals in that it has subject matter rather than geographical jurisdiction and does not supervise any district courts, it has the same need as the other courts for a principal staff person to perform the duties of a circuit executive. However, the Federal Circuit would not be able to have both a clerk of court appointed under 28 U.S.C. §711 and a circuit executive, although it could appoint a combined circuit executive/clerk.

Section 413—Amendment to the Jury Selection Process

This section amends the Jury Selection and Service Act, 28 U.S.C. § 1865, to permit the chief judge to authorize the clerk of the court, under the supervision of the court (and if provided for in the court's jury selection plan), to determine whether persons are qualified, unqualified, exempt, or excused from jury service. The Judicial Conference is satisfied that clerks or jury administrators authorized to determine qualification of prospective jurors will adhere to the principles of nondiscrimination by making their determinations using the objective criteria as required by the Jury Act and the courts' jury plans. Moreover, the function of screening juror questionnaires for qualifying criteria is generally more ministerial than is the task of screening juror hardship excuses for postponements or deferrals, which may already be delegated.

Section 414—Supplemental Attendance Fee for Petit Jurors Serving on Lengthy Trials

This section amends 28 U.S.C. §1871(b)(2) by shortening the number of days that a juror is required to serve before he or she is eligible for the supplemental daily fee authorized by this section. Currently, a juror who is required to serve more than thirty days is permitted to receive an additional ten dollars a day, above the established juror fee. The economic hardship associated with jury service worsens the longer jurors are required to serve, especially if service continues for more than a week. This amendment recognizes that fact by reducing to five days the time before jurors could qualify for the supplemental fee. This supplemental fee is $10 and will be paid to the jurors at the discretion of the trial judge.

TILE V—CRIMINAL JUSTICE AMENDMENTS

The Criminal Justice Act (CJA) is the means by which this nation fulfills the promise of the Sixth Amendment that every person accused of a crime shall have the assistance of counsel for his or her defense. Public confidence in the federal criminal justice system is based in large part on the assumption that no person will be deprived of life or liberty without the opportunity for an advocate to ensure effective representation. The CJA is built upon the fundamental principle that the determination of an accused's guilt or innocence should not be affected by the person's financial status.

In the Judicial Improvements Act of 1990 (Public Law No. 101–650), the Congress directed the Judicial Conference of the United States to conduct a comprehensive study to assess the effectiveness of the federal defender program. The Judicial Conference concluded, in a report submitted to the House and Senate Judiciary Committees in March 1993, that:

> The Criminal Justice Act has been a major success in carrying out the mandate of the Sixth Amendment of the United States Constitution and the policy of the Congress to provide effective assistance of counsel to all criminal defendants in the federal courts who are financially unable to retain their own attorney.[11]

[11] Report of the Judicial Conference of the United States on the Federal Defender Program (hereinafter referred to as "Judicial Conference Report "), March 1993, p. 11.

While recognizing the success of the CJA throughout its 31-year history, the Judicial Conference looked forward to identify means to improve the operation of the CJA to meet the needs of the evolving federal criminal justice system. The improvements to the CJA program proposed in H.R. 1752 are largely based upon the recommendations contained in the 1993 Judicial Conference Report. These measures would increase the efficiency and effectiveness of the CJA program. They are designed to ensure the high quality of legal representation, to compensate fairly the attorneys who furnish those representational services, and to reduce the administrative burden on the courts.

*Section 501—Maximum Amounts of Compensation for Attorneys**

This section would increase the case compensation maximum amounts for attorneys by approximately the rate of inflation since 1986 (43.3%), the last year case compensation maximums were increased. In 1986, recognizing that approval of vouchers in excess of the case compensation maximums was a significant administrative burden on the chief judges of the courts of appeals, Congress amended the Criminal Justice Act to authorize the chief judge to delegate voucher approval authority to another active judge of the court of appeals (18 U.S.C. § 3006A(d)(3).) Over the past decade, inflation has significantly eroded the level of the case compensation maximums for appointed counsel. In addition, the Sentencing Guidelines have been implemented, which has further increased the amount of work required for representation in each case. As a result, in many districts, particularly those districts for which higher rates of compensation have been established (up to $75 per hour, compared to the $60/$40 in-court/out-of-court rates prevailing in 1986), a much greater proportion of cases involve compensation in excess of the statutory maximum amounts. This has again substantially increased the administrative burden to review claims for excess compensation.

This section also would change the case compensation maximum applicable to counsel representing non-capital habeas corpus petitioners. The appointment of counsel to represent a non-capital habeas corpus petitioner is not mandatory; it is within the discretion of the presiding judicial officer based upon a determination that "the interests of justice so require." (18 U.S.C. § 3006A(a)(2)(B).) Those non-capital habeas corpus cases which merit the appointment of counsel generally have significant issues that warrant compensation greater than the $750 currently authorized by the Criminal Justice Act. Because the collateral representation is often as difficult as that provided in directly defending against a felony prosecution, the compensation for counsel in non-capital habeas corpus matters should be governed by the limits applicable to felonies (currently $3,500 in the district court and $2,500 in the court of appeals, but proposed in this section to increase to $5,000 and $3,600, respectively). It is not anticipated that the proposed amendment would have a significant budgetary impact because the chief judges of the courts of appeals (or their designees) have the authority to approve compensation in excess of the statutory limits in appropriate cases.

*Section 502—Maximum Amounts of Compensation for Services Other Than Counsel**

This section, as with the previous section relating to compensation of appointed counsel, would increase the compensation maximums of investigators, experts, and other service providers by approximately the rate of inflation since 1986 (43.3%), the last year case compensation maximums were increased. The Criminal Justice Act Revision of 1986 increased from $150 to $300 the amount which could be expended for investigative, expert, and other services without prior judicial approval, and increased from $300 to $1,000 the amount which could be expended for such services without the approval of the chief judge of the court of appeals or an active judge of the court of appeals to whom the chief judge has delegated this authority. (18 U.S.C. § 3006A(e).) The costs of professional fees have risen substantially since that time, resulting in a greater percentage of compensation vouchers being submitted to the chief judges of the courts of appeals or their designees for review, increasing the administrative burden of judicial officers. It is not anticipated that the proposed amendment would have a significant budgetary impact because the chief judges of the courts of appeals (or their designees) have the authority to approve compensation in excess of the statutory limits in appropriate cases.

*Section 503—Federal Tort Claims Act Amendment**

In amending the Federal Tort Claims Act (FTCA) in 1988, Congress appears to have inadvertently included federal public defenders within the FTCA, negating the 1986 amendment to the CJA authorizing the Director of the Administrative Office to provide representation. Currently, when a malpractice complaint is filed against a federal public defender employee, the Administrative Office notifies the Depart-

ment of Justice and the Department, in turn, arranges for counsel to provide representation. This puts the Department of Justice in the position of representing the interest of a federal public defender employee who is the courtroom adversary of the United States attorney. Although the Department can take steps to insulate the attorney who represents the federal public defender from those attorneys who prosecute defendants represented by the defender, doing so imposes an administrative burden on the Department.

This difficulty can be avoided by removing federal public defenders from the scope of the FTCA and restoring the CJA's authorization for representation by the Director of the Administrative Office.

The amendment in section 503 would exempt federal public defender organization officers and employees from the Federal Tort Claims Act for claims related to representational services and rely instead on the malpractice provision specifically added to the CJA in 1986 to respond to such claims. 18 U.S.C. §3006A(g)(3). This would simplify the provision of representation to federal public defender employees and avoid creating unnecessary conflicts of interest for the United States attorney and the federal public defender.

Based upon experience in providing representation to federal public defenders prior to their inclusion under the Federal Tort Claims Act, pursuant to the 1988 amendment to that Act (Public Law No. 100604), we anticipate that the costs of this provision would not exceed $50,000 annually and would probably be substantially less. These costs would be offset by reductions in the cost of representation provided by the Department of Justice.

Through the cooperative efforts of the courts, federal defenders, and private defense attorneys, the Defender Services program has secured for defendants in the federal courts the legal services essential to guard the basic rights of a fair trial guaranteed by the Constitution. Our system of justice is held forth as the model for the free world because no one may be convicted without the assistance of an attorney to test the evidence and to ensure due process. The improvements proposed in this bill would greatly assist the judiciary in its efforts to provide for eligible defendants this fundamental requirement of effective assistance of counsel.

APPENDIX A

SECTION _____. ELIMINATION OF MANDATORY RETIREMENT AGE FOR DIRECTOR OF FEDERAL JUDICIAL CENTER.

Section 627 of the 28, United States Code, is amended—
(a) by striking subsection (a), and
(b) by renumbering subsections (b) through (f) as (a) through (e), respectively.

SECTION-BY-SECTION ANALYSIS

SECTION _____. ELIMINATION OF MANDATORY RETIREMENT AGE FOR DIRECTOR OF FEDERAL JUDICIAL CENTER.

This amendment would eliminate the mandatory retirement age, now set at 70, for the Director of the Federal Judicial Center by striking subsection (a) of section 627 of Title 28. The Board of the Center has the power to define the term of service of the director and exercises that power, thus ensuring that reasonable limits on any director's tenure are in place. Furthermore, no provision similar to section 627(a) exists in the statute that created the Administrative Office (28 U.S.C. §§601 et seq.). In a practical sense, eliminating the mandatory retirement age will allow senior judges a greater opportunity to serve as director. Greater participation in governance by senior judges is one of the recommendations of the judicial branch's Long Range Plan for the Federal Courts (50b), a recommendation already implemented in part by Congress by its removal in 1996 of the statutory restriction [28 U.S.C. §§621 (a)(2)] on senior judge service on the Federal Judicial Center Board.

Mr. COBLE. Judge Rosen.

STATEMENT OF JOEL B. ROSEN, UNITED STATES MAGISTRATE JUDGE, CAMDEN, NJ, PRESIDENT, FEDERAL MAGISTRATE JUDGES ASSOCIATION

Mr. ROSEN. Yes, Mr. Chairman, Members, thank you very much for this opportunity.

My name is Joel Rosen. I am the president of the Federal Magistrate Judges Association which is a private association that comprises most of the magistrate judges in the United States. There are currently approximately 500 magistrate judges around the country.

As you know, we serve as adjuncts to and in support of the article III judiciary which, I believe, based on the caseload that we are all familiar of, has become more important over the years. I speak in support of the position of the Judicial Conference and in support of this judicial improvements bill.

Judge Schlesinger has detailed the elements of the bill. I would like to indicate to you why in, my view, these are important. In regard to the area of contempt, as things now stand, magistrate

judges have no authority to deal with inappropriate behavior that might occur in the middle of a hearing or a trial.

Magistrate judges last year, according to statistics provided by the Administrative Office of the Courts, engaged or performed over 161,000 pretrial duties in civil cases, tried to termination or resolve over 10,000 cases. That is roughly 18 percent of all cases tried in the Federal courts, civil cases tried.

In regard to criminal duties, magistrate judges resolved 96,000 misdemeanors and held proceedings in a quarter of a million felony proceedings. So as you can see, we are quite busy in those areas assisting the district court. If a witness fails to appear or if a witness engages in inappropriate behavior during a trial, at this juncture there is nothing that we can do.

The legislation, if passed, would give magistrate judges discrete limited authority consistent with the Federal Rules of Criminal Procedure to impose a penalty of no more than 30 case days in prison and a $5,000 fine. That is within the ambit of authority that magistrate judges already have in handling class C misdemeanors.

With regard to matters that are handled by consent, that is when the parties agree to the magistrate judge to try the case, this is a problem. For example, when an injunction is issued, a party ignores the injunction, another party comes back to the magistrate judge seeking contempt to enforce the injunction. As things currently stand, we have no authority to do anything in this regard. What must happen is a rather cumbersome procedure whereby we must refer the matter to the district court and he or she will deal with it in due course.

That can be a problem, of course, when behavior is happening in the middle of a trial, a witness doesn't appear or walks out. You have a jury impaneled, it is a problem. In the case of an injunction, often by the time the district court judge is able to reach the matter, the damage may have been done and the injunction may have been breached.

So for those reasons we view these as supplemental to our—to the efficient operation of the Federal courts, avoiding duplication, yet at the same time preserving the authority of the article III courts to review our activities.

With regard to consents, I will be very brief. Two years ago or 3 years ago, magistrate judges were given the authority to try without the consent of the parties petty offenses involving motor vehicles. Yet there must be the consent of the party to try a similar petty offense. Let me give you an example. Someone could be driving on Federal property, trespassing, and drunk. Drunk driving is clearly a serious offense. We have authority to try that now without the consent of the parties.

If the person happens to be trespassing or they stole something from a local PX, we would not have the authority to hear that offense. The party could opt to try those matters before the district court. Again, this is limited. We are supporting the Judicial Conference's position in seeking authority to try without consent all petty offenses, that is offenses punishable by no more than 6 months imprisonment and that is the basis of our support for this legislation. Again, this portion of the statute, in my view, while it preserves the party's right to article III appeal and supervision,

would be more efficient for the courts. Thank you. The red light has come on.

Mr. COBLE. I won't cut you off in the middle of a sentence if you had something else to say.

Mr. ROSEN. No, sir. Thank you.

[The prepared statement of Judge Rosen follows:]

PREPARED STATEMENT OF JOEL B. ROSEN, UNITED STATES MAGISTRATE JUDGE, CANDEN, NJ, PRESIDENT, FEDERAL MAGISTRATE JUDGES ASSOCIATION

Mr. Chairman, and Members of the Subcommittee, I am Joel Rosen, United States Magistrate Judge for the United States District Court for the District of New Jersey. I am the President of the Federal Magistrate Judges Association. The FMJA is a professional organization exclusively for United States Magistrate Judges. The vast majority of United States Magistrate Judges are members of this voluntary organization. The FMJA thanks you for the opportunity to make this presentation. Our organization believes that enactment of Sections 305 and 306 of H.R. 1752 will substantially improve the ability of Magistrate Judges to perform their functions and to assist in the administration of justice.

The Judicial Conference of the United States fully supports Sections 305 and 306 of H.R. 1752. The FMJA appreciates the Judicial Conferences endorsement of these changes.

SECTION 305 MAGISTRATE JUDGE CONTEMPT AUTHORITY

Existing Law

Under the present law a Magistrate Judge has no power to punish for contempt, either civil or criminal. See 28 U.S.C. § 636(e) . When contumacious behavior occurs, a Magistrate Judge currently is required to certify the facts of the persons conduct to a District Judge before whom the person is required to show cause why that person should not be held in contempt of court. The District Judge then hears evidence and determines if the person is in contempt and may impose punishment.

There are two major deficiencies in this process. The first is that this complicated process does not address the situation where a party, lawyer, witness, or spectator to the proceeding engages in such misbehavior that the actions obstruct the administration of justice and the proceedings before the Magistrate Judge. The second arises in civil consent cases where a Magistrate Judge presides over the entire case, including entry of judgment pursuant to 28 U.S.C. § 636(c). If a party seeks to enforce the judgment through contempt, the Magistrate Judge, who is the Judge most familiar with the case, cannot decide if the conduct by the disobeying party is a violation of the Courts order, but is required to certify the facts to a District Judge who is likely to be completely unfamiliar with the case.

Criminal Contempt

Subsections (2), (3) and (5) of Section 305 provide for criminal contempt authority with limited penalties. Under these provisions the maximum penalties that a Magistrate Judge could impose for criminal contempt can not exceed the penalties for a Class C misdemeanor, 30 days in jail and a $5,000 fine. In petty offense cases tried before a Magistrate Judge, Congress already has authorized Magistrate Judges to impose sentences of up to 30 days in jail and a $5,000 fine without the consent of a party, and in some other petty offense cases, up to six months and a $5,000 fine without consent. 18 U.S.C. § 3401(b) and (g).

Under these provisions, the instances where a Magistrate Judge could use criminal contempt authority are limited. Under Subsection (2), a Magistrate Judge could summarily impose a penalty for misbehavior occurring in the presence of the Magistrate Judge if it constitutes obstruction of justice. Under Subsection (3), a Magistrate Judge could impose criminal contempt penalties in civil cases where the Magistrate Judge presides with the consent of the parties, or in any misdemeanor case, where the criminal contempt constitutes disobedience of the Judges orders. Criminal contempt proceedings in these cases must be conducted after notice and hearing pursuant to Federal Rule of Criminal Procedure 42 (b) These criminal contempt provisions will improve Magistrate Judges ability to maintain order in the courtroom and to obtain compliance with the orders of the District Court.

Civil Contempt

Subsection (4) of Section 305 provides for civil contempt authority in civil consent and misdemeanor cases. Under the present system, when a Magistrate Judge disposes of a consent case pursuant to 28 U.S.C. § 636(c), the Magistrate Judge exer-

cises all the authority of the District Court except for the power to impose civil contempt to enforce the orders of the court. A waste of judicial resources thus occurs because a District Court Judge must enforce the orders of a Magistrate Judge in 28 U.S.C. § 636(c) cases or in misdemeanor or petty offense cases.

The Judicial Conference has taken the position that a District Judges involvement with a civil consent case should end when the case is assigned with the litigants' consent to the Magistrate Judge for adjudication. Congress agreed with this position several years ago when it determined that the only appeal route in a civil consent case is to the circuit court of appeals. Logically, it follows that a Magistrate Judge should have the power of contempt to enforce the orders which the parties themselves have consented to have the Magistrate Judge enter.

Other Contempts

Subsection (6) of Section 305 permits certification of contempt to a District Judge if the criminal contempt is so serious that the Magistrate Judge believes that the limited criminal penalties permitted in Subsection (5) are inappropriate for the conduct. In addition, if the misbehavior occurs outside the presence of the Magistrate Judge or if it is civil contempt that is not within the parameters of Subsection (4) , then the Magistrate Judge will certify the facts to a District Judge and direct the person to appear on a date certain to show cause why the District Judge should not impose contempt upon the person. This provision allows the District Judge to continue to supervise contempt matters that are so serious that a Class C misdemeanor punishment is insufficient, and in other contempts not covered by Subsections (2), (3), and (4).

Section 305 provides the Magistrate Judge with the authority needed to effectively conduct the business of the District Court.

SECTION 306 CONSENT TO MAGISTRATE JUDGE AUTHORITY IN PETTY OFFENSE CASES AND MAGISTRATE JUDGE AUTHORITY IN MISDEMEANOR CASES INVOLVING JUVENILE DEFENDANTS

Petty Offenses

The Federal Courts Improvement Act of 1996 recognized that there is no constitutional requirement that defendants consent to proceed before a Magistrate Judge in petty offenses cases (offenses for which the punishment is no greater than six months in jail and a $5,000 fine) . Congress amended Title 18 Sections 3401(b) and (g) so that consent need not be obtained in a petty offense charging a motor vehicle offense, in a Class C misdemeanor, or in an infraction.

The 1996 amendments were a step in the right direction, but they did not go far enough. There are many petty offense cases that proceed before Magistrate Judges where the offense does not involve a motor vehicle. Often on the same misdemeanor dockets, there are motor vehicle related petty offenses that proceed without consent before a Magistrate Judge and other petty offenses that require the consent of the defendant before they can proceed before a Magistrate Judge.

The practical problems of explaining the different consent provisions and the confusion to defendants resulting therefrom have been noticeable. In order to increase efficiency, the FMJA urges the adoption of the provisions in Section 306 that remove the necessity for consent to be obtained from a defendant in all petty offense cases. A common example of this confusion arises when a defendant has two petty offense charges, one of which requires the defendant to consent to proceed before a United States Magistrate Judge and another which requires no consent. A defendant may be charged with trespassing and drunk driving in a national park. The defendant is required to proceed to trial before a Magistrate Judge on the drunk driving charge, but may elect to be tried before a District Judge on the trespassing charge even though the charge arose out of the same fact situation. Each of the offenses in a national park carries the same maximum penalty—six months in jail and a $5,000 fine.

In order to maximize the effectiveness of Magistrate Judges in disposing of over 85,000 petty offense cases a year, the FMJA advocates the elimination of the consent requirement in all petty offense cases.

Juvenile Defendants

The remaining provisions of Section 306 relate to juvenile defendants. The amendments to 18 U.S.C. δ 3401(g) provide that a Magistrate Judge could, without the need for consent, exercise all the powers of the District Court in petty offense cases involving juveniles. In addition, the Magistrate Judge, with the consent of the juvenile, could exercise all powers of the district court in misdemeanor cases other than petty offense cases. And finally, the Magistrate Judge could impose a term of imprisonment in a juvenile case. Since the vast majority of misdemeanor cases are

heard and decided by Magistrate Judges, these amendments enable Magistrate Judges to try juvenile defendants in the regular handling of misdemeanor matters that arise out of a federal enclave.

We believe that these minor amendments would expedite justice for juveniles and their victims.

CONCLUSION

On behalf of the Federal Magistrate Judges Association, I wish to thank the Subcommittee for allowing the Association to appear at this hearing and to comment upon these issues. I will be happy to answer any questions that the Subcommittee may have.

Mr. COBLE. We are not that rigidly inflexible.

Mr. ROSEN. Well, I want to respect your rules, sir.

Mr. COBLE. I appreciate that. Mr. Rosen, when a magistrate must certify facts to a district court judge for a contempt ruling, how long does it take to get a ruling?

Mr. ROSEN. Well, sir, it could be anywhere from days, weeks, or potentially months depending on the work load of the district court judge. Not only that, the district court judge would have to become familiar with the proceedings. Under the current statute, we have referred to the district court judge but he or she must make, have a full plenary hearing, and they would get to it when they are able to with their busy schedules.

Mr. COBLE. I am sure that would directly contribute to the backlog of cases in the Federal courts.

Mr. ROSEN. Unquestionably, sir. Plus if the magistrate judge is in the middle of a trial, it is going to be a real problem in terms of time and cost to the litigants and to the jurors.

Mr. COBLE. As an aside, I want to thank Mr. Berman. In his opening statement he referred to the fact that we are Courts and Intellectual Property. Most of the public's attention on our subcommittee is usually directed at the intellectual property side. As Mr. Berman said, we do not casually dismiss the court side. I hope that none of you feel that you are a stepchild to that end.

Mr. Schlesinger, what would be the penalty and the consequences imposed upon a judge who elects to carry a firearm, assuming this is passed, without having completed the training and safety program as required?

Mr. SCHLESINGER. Well, I think there are two aspects, penalty and consequences. The way that the statute is written, it requires that the training be completed before you can be certified to carry the weapon. So I would assume that if a judge does not complete the training, he or she cannot be certified to carry the weapon.

Therefore, from a criminal standpoint, I suspect we would have to go back and look at the State law. And if that judge is not complying with the State law and it is a violation of that law to carry a concealed weapon, they could possibly be criminally charged.

More importantly though, I think, is the civil aspect. Currently, if a judge carries a concealed weapon as authorized by State law, there is a question under the Federal Tort Claims Act whether that judge, if they have to use the weapon, is within the scope of their employment in doing so. That has never been litigated and it is floating around in our minds as to what type of protection the judge might have.

If the judge is not certified to carry the weapon because they haven't completed the course, then I would suspect they would

know there is no way that they would be covered by the Federal Tort Claims Act and they would be civilly liable as an individual. That in and of itself probably would send a clear message to judges, if the legislation is passed, that you better realize that the government isn't going to get you off the hook and come in and defend you or possibly pick up the judgment.

If the person does comply with the certification requirement, takes the training and is then authorized to carry the weapon, I think the legislation then would be clear that they would be acting within the scope of their employment if they have to use it and be protected as any other government employee within the scope. That in and of itself should probably guide the judge as to which way they would want to go.

Mr. COBLE. I asked that because the written testimony was silent on that point and I wanted to get the response on record.

Mr. Rosen, what is the current procedure used by the Federal judiciary to sentence juveniles who have been tried for a petty offense before a magistrate?

Mr. ROSEN. Currently, magistrate judges are limited in their authority to sentence a juvenile. We cannot sentence a juvenile to any period of incarceration. Additionally, we are not able to handle misdemeanors, class A misdemeanors at all involving juveniles. Part of this legislation, if passed, would give magistrate judges the authority to dispose of cases involving juveniles in the same fashion as adults, but currently there is no authority to incarcerate a juvenile or handle anything other than a petty offense.

Mr. COBLE. Let me try one more question before the red light illuminates in my eyes. Mr. Schlesinger, in section 502, the Judicial Conference proposes an increase in the maximum amount of compensation for counsel. Is it your opinion that the current rate of compensation has resulted in a lower quality of representation, A, and if so, B, do you think that this increase would attract a higher quality of representation?

Mr. SCHLESINGER. Are you talking about the extra, the $75 hourly rate or the maximum extension?

Mr. COBLE. Well, you could answer both.

Mr. SCHLESINGER. The maximum extension, I think, was legislated in 1986 which requires an enormous amount of vouchers having to go to the circuit court for the chief judge to authorize an overpayment. I think that the proposed legislation basically just keeps up with inflation.

It is about 43 percent. The $75 an hour fee, I think, is needed. I don't think that there has been a diminution in the quality of service. The people who are on those panels are dedicated, sincere people who aren't in there for the money because they basically on $60 an hour and $40, I think, are losing money. Seventy-five they might break even with paying their staff.

But I think it would help increase the number of attorneys who would sign up to be on those panels. In my division, the Jacksonville Division, in my court now we have approximately 25 on the civil panel. We have a public defender in the district, too. I can remember in the early days when the money was halfway decent that we probably had somewhere between 50 to 75 lawyers—good quality lawyers, not just right out of school—to handle these cases that

were on the list. But as inflation got to where it is today, the numbers have dwindled.

Mr. COBLE. I thank you.

The gentleman from California.

Mr. BERMAN. Thank you, Mr. Chairman. I don't have any questions. I wanted to apologize to the second panel for having to leave now because there is this effort on the floor by our very distinguished Chairman to considerably add to the Federal courts' jurisdiction through an amendment to criminalize depiction of violence to minors, and I thought I should be there to represent the interests of the Federal judiciary.

So I am going to read the testimony before we get to a mark up. I know Mr. Sensenbrenner's bill is an interesting one and I know there is testimony on that. I just wanted to commit to you and to the witnesses coming up next that I will be taking a look at that.

Mr. COBLE. And you will be doing the Lord's work in the interim, right?

Mr. BERMAN. I think so, but I am not sure whether Mr. Hyde or the lawyers do.

Mr. COBLE. The gentleman from Wisconsin.

Mr. SENSENBRENNER. I will just put my two cents worth in saying that the hope the Federal judiciary is not on the side of the depiction of violence to minors, but that will probably be decided by their wisdoms across the street should this become law.

I have one question relative to the firearms provision in this bill. My State is one of the few that restricts carrying a concealed weapon only to sworn police officers and nobody else can carry a concealed weapon. This has been something that has been rather—is noncontroversial in the whole emotional debate on guns.

There are other States, like Virginia, that allow anybody to walk in and get a permit to carry a concealed weapon upon meeting certain qualifications. I am concerned about the Federal preemption in my State, but I am also wondering what would happen if a State would have lesser requirements for a permit to carry a concealed weapon and the Federal judge elected to go the State route to get such a permit rather than meeting the higher qualifications that are contained in this legislation?

Mr. SCHLESINGER. I think that raises the issue of the civil consequences that I mentioned before. I think that it could be subject to debate as to whether or not that person would have protection as a government employee acting within the scope of their employment under the Federal Tort Claims Act if they avoid the strictures that Congress has said, in order to do this as a Federal law enforcement officer and as a Federal employee, this is what you must do.

As I read the bill, it basically requires the Judicial Conference, in order to implement it, to have this training program. Of course, as you know, it was worked out in cooperation with the Department of Justice to have the U.S. Marshal Service do it. So I think that a judge who does what you mention and just utilizes the State provisions in order to carry the weapon, in the event that there is a discharge of the weapon and something happening, runs the likelihood of having to wind up defending themselves in a civil action

as an individual rather than as an employee of the United States working within the scope of their employment.

Mr. SENSENBRENNER. Thank you.

Mr. COBLE. I thank the gentleman. The gentleman from from Indiana.

Mr. PEASE. Thank you, Mr. Chairman. I want to commend the Chairman on the bill. I support virtually all of it. I do have some questions about some bits of it. They focus interestingly enough on the area that you both touched on, and that is the criminal contempt authority proposed for magistrate judges.

It appears to me that we are more and more to moving magistrate judges to article III judges, and I wonder if there is going to be much distinction left at the rate that we are going. That may or may not be a bad thing, but I don't want us to get there by accident without having thought it through first. My question is—well, I need to understand, first of all. Magistrate judges currently have contempt authority in criminal cases before them; is that correct or not correct?

Mr. ROSEN. Currently, we have no contempt authority at all.

Mr. PEASE. Even in criminal cases?

Mr. ROSEN. That is correct. Even in a bail hearing, a preliminary hearing. We do jury trials, misdemeanors where the punishment is up to a year, and we have no contempt authority.

Mr. PEASE. The proposal here then is to add—do you have any civil contempt authority?

Mr. ROSEN. No, sir.

Mr. PEASE. The proposal, as I understand it, is for criminal contempt authority only. Is civil contempt authority proposed as well?

Mr. ROSEN. Yes, sir. The bill speaks and it is in two sections. There was a section concerning criminal contempt.

Mr. PEASE. 305?

Mr. ROSEN. 305, the section is—let me just—6—no, no, no. B. 3401, B and G. That talks about criminal—305—well, 305 handles both. There is a criminal contempt provision, the number of which escapes me right now. That has a limit of 30 days imprisonment and a $5,000 fine.

That was proposed as a clear distinction between magistrate judges and article III, a bright line, if you will, since magistrate judges already have the authority to impose that penalty for certain misdemeanors. With regard to civil contempt which we do not have, section 305, if passed, in those cases with the party's consent, that is, where we handle the matter from beginning to final judgment with an appeal to the court of appeals, we would have civil authority, civil contempt authority in compliance with the Federal Rules of Civil Procedure. So there is a distinction there.

Mr. PEASE. Mr. Chairman, is that my 5 minutes that is up?

Mr. COBLE. No. I anticipated that we would be interrupted by now. We have not, so continue.

Mr. PEASE. Thank you, Mr. Chairman. So the current procedure, if the magistrate determines that there should be contempt proceedings, go to the district court judge, the district court judge has a plenary hearing on the matter and makes the determination.

Mr. ROSEN. Correct.

Mr. PEASE. How would that be different? Other than the fact that the district court judge is doing it instead of you, how would that procedurally be different? Would you have a hearing within your magistrate court at that point to make a decision?

Mr. ROSEN. Yes. If this legislation is passed, then with regard to the limited criminal contempt proceedings, we would conduct those and the party would have a right to appeal, of course, to the district court. With regard to the civil consent proceeding, we would conduct the proceeding in compliance with the Federal Rules of Civil Procedure and Criminal Procedure with an appeal to the Court of Appeals. I have those sections now, section 305, 23, and 5 pertain to criminal contempt. Civil contempt is section 4 of 305.

Mr. PEASE. Thank you. So in effect, the procedure would be the same, the forum in which it was conducted would be different.

Mr. SCHLESINGER. The procedures would be the same. They would just be before a different judge. It would be before a magistrate judge rather than a district judge.

Mr. PEASE. Okay. Thank you very much. Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Pease. Thank you, gentleman, for your appearance. In the interests of time and without objection, I want to submit some additional questions to this panel regarding the issue of cameras in the courtroom and a proposal by Congresswoman Capps to establish Santa Barbara, California, as a place for holding court. If you could respond to these questions in writing, gentlemen, I would appreciate that. We will place these answers into our record. You are dismissed now. We thank you again for appearing today.

[The information referred to follows:]

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

July 8, 1999

Honorable Howard Coble
Chairman, Subcommittee on
Courts and Intellectual Property
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Mr. Chairman:

Thank you for your letter of June 22, 1999, requesting that I respond to your two questions on pending legislation that would affect the federal judiciary, but that are not included in H.R. 1752, the "Federal Courts Improvement Act of 1999."

1. With regard to H.R. 1281, which would provide for cameras in federal courtrooms, the Judicial Conference strongly opposes this bill, and has opposed similar legislation in the past. For more than 50 years the Federal Rules of Criminal Procedure have barred cameras from federal court during criminal proceedings. However, the Judicial Conference of the United States has experimented with and studied the presence of cameras during federal civil proceedings. In September 1994, the Conference concluded that the potentially intimidating effect of cameras on some witnesses and jurors was cause for considerable concern. A United States judge's paramount responsibility is to guarantee citizens a fair and impartial trial. Taking into account this considerable obligation assigned judges under the Constitution, the Conference concluded that it was not in the interest of justice to permit cameras in federal courtrooms during civil proceedings.

In March 1996 the Conference adopted a policy that allows each federal court of appeals to decide for itself whether to permit cameras in the courtroom. Jurors and witnesses are not present during appellate court proceedings. Currently, only two of

the 13 appellate courts permit camera coverage. The Conference's September 1994 policy, insofar as it concerns cameras in the district courts during civil proceedings, and the Rule of Criminal Procedure that prohibits camera access to United States courts remain.

2. At the present time, the Judicial Conference has no position on H.R. 1306, which would allow Santa Barbara, California to be a place of holding court. The Conference has a long-standing procedure for recommending action to Congress on the establishment of places for holding court. The procedure requires the Director of the Administrative Office to transmit each such bill to both the chief judge of each affected district and the chief judge of the circuit in which the district is located, requesting that the district court and the judicial council for the circuit evaluate the merits of the proposal and formulate an opinion of approval or disapproval to be reviewed by the Conference's Court Administration and Case Management Committee in recommending action to the Conference. In their evaluations, the district and circuit consider the district's caseload, judicial administration, geographical, and community-convenience factors, as well as the views of the relevant U.S. Attorneys' offices.

We have sent a copy of H.R. 1306 to Chief Judge Terry J. Hatter, Jr. of the Central District of California and Chief Judge Procter Hug, Jr. of the Ninth Circuit. We are awaiting their responses, and will keep you apprized of any action taken by the Judicial Conference.

On behalf of Judge Schlesinger and the entire judiciary, I would like to express our appreciation to you for providing us the opportunity to testify on H.R. 1752, the "Federal Courts Improvement Act of 1999," as well as to answer your questions. We, too, look forward to working with you on our mutual efforts to improve the United States federal courts.

Sincerely,

Leonidas Ralph Mecham
Director

Mr. COBLE. The first witness on panel two will be the Honorable John F. Nangle who is the Chairman of the Judicial Panel on Multidistrict Litigation and a United States District Judge for the Southern District of Georgia. Judge Nangle received his A.A. degree from Harris Teachers college, his BS in public administration from the University of Missouri, and his JD degree from Washington University School of Law. This doesn't say here in St. Louis, but I would presume. I don't have a complete sheet here.

Our next witness is—that is correct, is it not?

Mr. NANGLE. That is correct.

Mr. COBLE. Our next witness is Thomas J. McLaughlin with the Seattle law firm of Perkins Coie testifying on behalf of the Boeing Company. His areas of expertise are product liability and aircraft accident litigation. Mr. McLaughlin received his JD degree cum laude from Harvard University, his MS in aeronautical and astronomical engineering from the Ohio State University and his BAAE cum laude also from Ohio State University.

Our final witness is Mr. Brian Wolfman who is a staff attorney at public citizens litigation group, a public interest law firm based here in Washington. The litigation group is a division of Public Citizens founded by Ralph Nader in 1971. Mr. Wolfman works on consumer health and safety issues before regulatory agencies and in the Federal courts with an emphasis on drug and medical device regulation, court access issues, opposing Federal preemption of State product liability law, and representing absent class members in consumer class actions. He has argued cases at all levels of the Federal and State judiciaries. Mr. Wolfman is a graduate of the University of Pennsylvania and the Harvard School of Law.

We have written statements from the witnesses on this panel. I ask unanimous consent that they be submitted into the record in their entirety.

Gentlemen, it is good to have you all with us. If you will comply with the 5-minute rule, we would be appreciative. I always make it clear, folks, that your written testimony is not casually discarded. We examine it very closely. We impose the 5-minute rule for obvious reasons, the interests of time and particularly, since the juvenile justice bill is on the floor, and, Mr. Pease, I expect that you and I will get over there once we get through here. It is real good to have you gentlemen here.

Mr. COBLE. Judge Nangle, why don't you kick us off

STATEMENT OF JOHN F. NANGLE, CHAIRMAN, JUDICIAL PANEL ON MULTIDISTRICT LITIGATION AND UNITED STATES DISTRICT JUDGE, SOUTHERN DISTRICT FOR GEORGIA

Mr. NANGLE. Thank you, Mr. Chairman and needless to say thanks for the opportunity of appearing here. I don't know that I could improve upon the opening comments of Chairman Sensenbrenner and Chairman Coble in covering the matters that we have in front of us. I would just add a bit about myself.

I spent 25 years as lawyer, primarily a plaintiff's trial lawyer and 25 years as a judge. I have been in all parts of the territory that we are discussing. I am not going to tell you about the panel.

I suspect it might be wise to do so. I would just explain one thing about it because of the time limitations.

We hold hearings, Mr. Chairman, and Congressman Pease, every other month, 6 times a year, at which time we give the lawyers in all of the cases that come before us an opportunity to be heard and argue whether or not a matter should be centralized in a particular district and docket before a judge or whether it should not be centralized and if it should be centralized, what judge will handle the case.

That is a very oversimplification, but that is what we do. I am appearing here, I should say, not only with the approval of the Judicial Conference but at their instigation and that of several committees of the Judicial Conference, but I personally spoke to the Chief Justice and he is in agreement with our procedure here this afternoon because that is important because we are going against—going against, but kind of following through the suggestion that maybe Congress should be the party to attend to our problem.

We are proposing something that has been done for 30 years. Thirty years it has been done successfully. And suddenly we find out, and I have no disagreement with the Supreme Court decision, it is right. But we suddenly find out that the district courts and the appellate courts that have been watching these matters for those 30 years were wrong.

So what did we do about it? I started getting letters and comments from judges all over the country. And the short and the long story, we put together a proposal that went through a lot of pain and anguish. It wasn't put together simply. We had academic input, things of that sort.

And what it does, it allows what we call the transferee judge. He is the judge that receives or she is the judge that receives the cases to handle in our multi-docket litigation. It gives that judge the right to retain those cases for trial, provided they meet certain requirements. They have got to meet certain requirements and those requirements are basically the 1404 a., the convenience of the parties and the witnesses and the interests of justice. Now, I would say, I think Congressman Coble mentioned, the suggestion was—"suggestion" may be too strong a word. It was an observation by Justice Souter—did you want to interrupt?

Mr. COBLE. No. I am just directing attentive ears.

Mr. NANGLE. That is my reason for appearing here. I have a very fervent, heartfelt plea. This is not a little Mickey Mouse thing, but this is a powerhouse need for us to survive. I want to tell you something. There is only one body in the United States of America, judicial body, and that is the MDL panel, that presently can cope with the massive multitude of civil complex litigation that is spun around this country.

There is no other vehicle, period. If you don't give us this, I think we are going to go down the hole. The reason I say that is, if we end up with what Mr. Wolfman wants us to do, and I don't know if he is really serious about it, but if he is, we might as well fold up, close us down and wipe us out and why waste time on the MDL. Because judges are not going to want to be handling these cases just to—lawyers Wolfman and McLaughlin arguing about, I am going to take a deposition in Des Moines. No, I want to go to

Chicago. I want to answer this interrogatory 3. No, I don't want to answer that.

That is Mickey Mouse stuff. Judges don't take these cases for that purpose. Most of us are senior judges. We love what we are doing or we wouldn't be doing it. These judges around the country are highly experienced. They are challenged by this and those are the guys, the residuum of power and strength in the Federal judiciary that are really going to be thrown out the window if we follow Mr. Wolfman's suggestion.

So I would say to you—I want to complete my comments. I got the reading that most everybody, including Congressman Berman, were in favor of this. Let me quote Judge Bob Sweet from New York, a top notch judge.

"The ruling in Lexecon has substantially eviscerated the practice, purposes, of the MDL assignments. After all, pretrial discovery and related proceedings simply set the stage for ultimate resolution. In order to achieve the benefits of consolidation, the assigned judge should have the ability to conduct the consolidated trial on liability."

So I cannot improve on that language. And with your permission, I will go to section 3 here, Mr. Chairman. Now, this section, and I am sorry that Congressman Berman wasn't here because it has a history that he may, probably knows about. My time is up already?

Mr. COBLE. Well, you can start to wrap up.

Mr. NANGLE. I will wrap it up quickly. But it has an extensive history of support by Bob Kastenmeier. I have worked with his staff. We studied with academics. We went through every possible step. We considered every possible person that would have input into this kind of legislation because it was important. Not only did Congressman Kastenmeier, who was a great protector of the Federal judiciary I may say, and Congressman Hughes followed through. Congressman Sensenbrenner was also in that same group, Congressman Moorhead. Congressman Jack Brooks, he has had a wonderful statement that I would like to put in the record.

All of those people have shown solid bipartisan support for this second part of the bill, section 3 of 2112. I think that I will stand on that, Mr. Chairman.

Mr. COBLE. Judge Nangle, we appreciate all witnesses who appear before our subcommittee, but I especially appreciate spirited witnesses, and you are a spirited witness.

Mr. NANGLE. Thank you.

Mr. COBLE. Good to have you with us.

[The prepared statement of Judge Nangle follows:]

INTRODUCTION

PREPARED STATEMENT OF JOHN F. NANGLE, CHAIRMAN, JUDICAL PANEL ON MULTIDISTRICT LITIGATION AND UNITED STATES DISTRICT JUDGE, SOUTHERN DISTRICT FOR GEORGIA

My name is John F. Nangle. I am a senior judge of the United States District Court for the Eastern District of Missouri, although I transferred my duty station to Savannah, Georgia, almost nine years ago. I am appearing here today as the Chairman of the Judicial Panel on Multidistrict Litigation, composed of six other federal judges besides myself—William B. Enright (S.D. California), Clarence A. Brimmer (D. Wyoming), John F. Grady (N.D. Illinois), Barefoot Sanders (N.D.

Texas), Louis C. Bechtle (E.D. Pennsylvania) and John F. Keenan (S.D. New York). On behalf of the seven of us, I would like to thank the Subcommittee for its invitation to appear and testify today.

SECTION 2 OF H.R. 2112—TRANSFER FOR TRIAL OF MULTIDISTRICT LITIGATION PREVIOUSLY TRANSFERRED FOR PRETRIAL

Section 1407 of Tile 28 should be amended to allow a transferee judge to retain cases for trial or transfer those cases to another district for trial, as provided by Section 2 of H.R. 2112 and approved by the Judicial Conference of the United States in September 1998.

- Section 1407(a) authorizes the Judicial Panel on Multidistrict Litigation to transfer related cases, pending in multiple federal judicial districts, to a single district for coordinated or consolidated pretrial proceedings, upon the Panel's determination that centralizing those cases will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the cases.
- The transferee judge, accordingly, becomes the federal judicial expert regarding the cases as a result of supervising the day-to-day pretrial proceedings and thereby becoming intimately familiar with the entire docket's dynamics and nuances, including the underlying facts, laws, lawyers' tactics, and the realistic settlement, judgment and attorneys' fee values.
- Section 1407(a) also requires the Panel to remand each transferred case to its original district at or before the conclusion of the coordinated or consolidated pretrial proceedings, unless the case is previously terminated in the transferee court.
- Nevertheless, since enactment of 1407 thirty years ago transferee judges were authorized by circuit and district court case law to transfer those cases to their own district or another district for trial under 28 U.S.C. § 1404. The Supreme Court reversed that practice in *Lexecon Inc.* v. *Milberg Weiss,* 523 U.S. 26 (1998), because of the language of § 1407, and observed that Congress properly could resolve the issue.
- As of September 30, 1998, nearly 141,000 cases had been included in § 1407 proceedings. Approximately 140 transferee judges, as of February 1999, were supervising about 160 groups of multidistrict cases, each group composed of various numbers of cases, some totalling in the hundreds, thousands or tens of thousands, in varying stages of development. This multidistrict litigation entails significant national legal matters, such as asbestos, silicone gel breast implants, diet drugs like fen-phen, hemophiliac blood products, Norplant contraceptive and orthopedic bone screw products liability litigation; all major air crashes including TWA Flight 800 off Long Island, Secretary of Commerce Ron Brown in Croatia, ValuJet in the Florida Everglades and recently Swiss Air near Nova Scotia; sales practices of several insurance companies; billing by health care providers; antitrust allegations in the markets for brand-name prescription drugs, compact discs, contact lenses, corn sweeteners, explosives, tissues, toys and oil; securities laws claims involving NASDAQ; notices in the sweepstakes business; various patents; and employment practices.
- Often the transferee judge and the parties have focused on a consolidated trial in the transferee district on the common liability issues, such as whether a product is defective or causes a specific disease, or whether defendants conspired to engage in unlawful conduct. Such a trial has obvious efficiencies of resolving shared questions in one forum instead of multiple forums, leaving individual issues such as damages to be tried later in the transferee district or transferor districts, as may become appropriate.
- But, as a practical matter, multidistrict cases, like other cases, usually settle before any individual trials become necessary. The anticipation of trial in the transferee judge's court historically has provided powerful inducement to spawn global or individual settlements, either during pretrial, on the eve of trial, during trial, after a consolidated liability trial, or, if necessary, after some bellwether trials on damages. Even if the transferee judge does not exercise the self-transfer authority, simply the parties' perception that the transferee judge might order self-transfer has contributed significantly to the disposition of many multidistrict dockets in advance of trial. Any interference with this dynamic is no small matter, because within the nearly 141,000 actions included in § 1407 proceedings as of last September, many have involved multiple plaintiffs and defendants, with correlating claims, counterclaims,

cross-claims, third-party claims and intervenors, totalling millions of claims altogether.

- Since *Lexecon*, significant problems have arisen that have hindered the sensible conduct of multidistrict litigation. Transferee judges throughout the United States have voiced their concern to me about the urgent need to enact this legislation. Indeed, transferee judges have been unable to order self-transfer for trial, even though all parties to constituent cases have agreed on the wisdom of self-transfer for trial. E.g., MDL–1125—*In re Air Crash Near Cali, Colombia, on 12/20/95*, S.D. Fla. (Judge Highsmith).
- The alternative recognized in *Lexecon* is for the Panel to remand the cases to their transferor districts, and then have each original district court decide whether to transfer each case back to the transferee district for trial purposes under a Representative in Congress From the State of § 1404. Clearly this alternative is a cumbersome, repetitive, costly, potentially inconsistent, time consuming, inefficient and wasteful utilization of judicial and litigants' resources. Instead, complex multidistrict cases should be streamlined as much as possible by providing the transferee judge as many options as possible to reasonably expedite trial when the transferee judge, with full input from the parties, deems appropriate.
- Importantly, self-transfer for trial by a transferee judge is not to a distant, unfamiliar forum, but to one wherein the parties and transferee judge have already become well acquainted through the ongoing coordinated or consolidated pretrial proceedings pending before the transferee judge.
- Venue is usually not a concern in any event because most key multidistrict defendants conduct business nationwide. For those defendants who do pose traditional venue concerns, such as local banks or health care providers, were they to oppose trial transfer, the transferee judge surely would weigh their concerns. The result could be either to sever their claims for a remand suggestion to the Panel or a transfer for trial upon finding that the interest of justice and the convenience of the parties and witnesses would be served. Again, these parties' ongoing familiarity with the transferee judge may cause them to prefer trial before the transferee judge, and they should have the option to do so.
- Likewise, a transferee judge, particularly one sitting by intraciruit or intercircuit assignment to supervise δ1407 proceedings, may find it expeditious to transfer multidistrict cases for trial toanother district, such as the one where the transferee judge normally sits. *E.g.*, MDL–979—*In re Combustion, Inc., Hazardous Substances Cleanup Litigation*, W.D. La. (Judge Haik).
- Clearly, transferee judges and parties in centralized multidistrict cases should have flexible options to conduct trials as expeditiously and fairly as possible.
- Based upon prior positions taken by parties in multidistrict cases, many experienced multidistrict litigators can be expected to support this legislation. For example, among those filing amicus briefs in support of the self-transfer authority advocated by the *Lexecon* defendants, who are traditional plaintiffs' class action firms, were leading corporate and investment banking firms, trade associations representing many of the nation's life and property and casualty insurers, the trade association of the country's aerospace manufacturers, a major pharmaceutical company, and a significant asbestos litigation defendant. *Lexecon* Inc. itself did not object to self-transfer in the main group of cases (arising from failure of Lincoln Savings & Loan Association led by Charles Keating) from which *Lexecon* peripherally sprang.
- The concept of trial transfer in conjunction with pretrial transfer for multidistrict cases has already been enacted by Congress—Section 1407(h) authorizes the Panel to order transfer for trial, as well as pretrial, of any action brought under Section 4C of the Clayton Act (the *parens patriae* provisions). Indeed, in December 1998, after *Lexecon* ended the transferee judge's self-transfer option, the Panel granted a motion for trial transfer of *parens patriae* actions previously transferred for centalized pretrial under § 1407(a) in MDL–1030—*In re Disposable Contact Lens Antitrust Litigation*, M.D. Fla. (Judge Schlesinger).

One of our most experienced transferee judges, Judge Robert W. Sweet of the Southern District of New York, summed up the necessity for Section 2 of H.R. 2112 superbly in a recent letter to me: "*Lexecon* has substantially eviscerated the practical purposes of the MDL assignments. After all, pretrial discovery and related proceedings simply set the stage for ultimate resolution. In order to achieve the bene-

fits of consolidation, the assigned judge should have the ability to conduct a consolidated trial on liability. Such a power would greatly enhance the possibility of settlement and, most importantly, eliminate the threat of inconsistent determinations throughout the country."

Thus, I truly plead with this important House Subcommittee to extend trial transfer authority to transferee judges who are already exercising pretrial authority over multidistrict cases. The big winners will be your constituents, both plaintiffs and defendants, who will reap substantial savings of time and money.

SECTION 3 OF H.R. 2112—STREAMLINING MULTIPLE LITIGATION ARISING FROM SINGLE-EVENT CATASTROPHES

Section 3 of H.R. 2112, which has passed previous sessions of the full House of Representatives several times, creates a special form of federal jurisdiction, carefully circumscribed to reach only multiparty, multiforum, mass accident litigation. The legislation would amend several portions of the Judicial Code in order to deal with problems of complex litigation dispersed in multiple federal and state courts and arising out of single-event catastrophes such as airline accidents, hotel fires, train wrecks and other disasters in which many people are killed or seriously injured. In particular, it would make minimal diversity of citizenship jurisdiction available to parties in litigation arising out of a "single accident" in which at least 25 people are killed or suffer injuries resulting in damages exceeding $50,000 per person. To ensure that the litigation applies only to accidents likely to give rise to duplicative, multiforum litigation, not only must the parties meet the requirements of minimal diversity (meaning, generally, that at least one defendant and one plaintiff be citizens of different states), but also any two defendants must reside in different states, substantial parts of the accident must have occurred in different states, or a substantial part of the accident must have occurred in a state different from one in which a defendant resides.

Once an action meeting the above stated requirements makes its way into a federal district court by filing, removal or intervention (pursuant either to the special jurisdiction created by the bill or general diversity jurisdiction), the legislation instructs the district court to notify the Judicial Panel on Multidistrict Litigation, which under existing Section 1407 is authorized to transfer related civil actions to a single federal forum for pretrial proceedings. That forum, the "transferee" court, is directed to undertake a multifactor analysis leading to the designation of a single jurisdiction whose substantive law is to be applied to all other actions arising from the same accident, except to the extent that the transferee court orders the application of additional sources of law with respect to a party, claim or other element of an action.

The transferee court is authorized to retain actions transferred by the Panel not only for resolution of pretrial matters, as currently provided by Section 1407, but also, at the transferee court's option, for determination of liability and assessment of punitive damages. The transferee court would have a similar option with respect to actions removed from state court pursuant to the bill's multiparty, multiforum minimal diversity jurisdiction. The legislation contemplates that actions transferred under Section 1407 or removed pursuant to the minimal diversity jurisdiction would be remanded to their originating federal districts or state courts for the determination of compensatory damages, unless the transferee court found, for the convenience of the parties and witnesses and in the interests of justice, that the action should be retained for the determination of such damages.

Section 3 of H.R. 2112 benefits litigation that would ordinarily be centralized for pretrial proceedings by the Panel under Section 1407 in three significant ways: 1) it authorizes the transferee court to retain actions for trial of issues of liability, punitive damages and/or compensatory damages; 2) it provides for removal from state court to federal court of related litigation arising from the same, single accident; and 3) it directs the transferee court to select a single source of substantive law to apply to all actions arising from the same accident. Each of these provisions addresses problems currently contributing to a waste of judicial resources, increased litigation costs, heightened risk of inconsistent results, and delays in the dispensation of justice.

If the Panel had to identify today the single most useful improvement conferred by Section 3 of H.R. 2112, it would without doubt be the bill's provision allowing the transferee court to retain actions for trial, as discussed previously in this statement. The utility of self-transfer authority is particularly great in the context of mass disaster litigations. For in such litigations all victims (airplane or train passengers, hotel guests, etc.) will ordinarily be situated identically vis-a-vis the defendants, making the case for consolidation of their actions on common issues especially

compelling. There usually are no "individual differences" among the accident victims which would affect or complicate trial of the issue of a defendant's liability or the appropriateness of an award of punitive damages. Among other things, resolution of such matters in a single transferee court would 1) ensure that the trial would occur before the transferee judge who, as a result of presiding over day-to-day complex pretrial proceedings, is the one judge most familiar with the factual and legal issues; 2) enable plaintiffs' counsel to coordinate their efforts and minimize their fees and expenses through a single trial, thereby permitting them to maximize the recoveries available to their clients; 3) ensure that insurance proceeds available to deserving victims would not be depleted by the costs and attorneys' fees incurred by defendants in repeated trials in multiple federal and state jurisdictions; 4) eliminate the risk that punitive damages would be imposed in an inconsistent manner or repeatedly assessed against the same defendant; 5) eliminate the possibility of inconsistent adjudications on common liability issues; and 6) conserve the already overtaxed resources of state and federal courts by avoiding multiple and repeated trials before different courts on the same common issues.

Again, I emphasize the beneficial effect on settlements arising from the parties' early knowledge of when and before whom trial would occur. Additionally, in times past the concentration of all federal actions in a single forum has further contributed to the parties' amenability to reach stipulations greatly streamlining the conduct of certain litigations. In various domestic air disasters, for example, the principal defendants have sometimes stipulated to liability in exchange for plaintiffs' agreement to waive punitive damages. Such results are more easily achievable when they can be implemented on a "global" basis in a single forum.

As a practical matter, litigants in mass disaster dockets have themselves often recognized the desirability of single trials of common issues. Often transferee judge decisions to consolidate trials on the issue of liability are made upon the joint request of plaintiffs and defendants. The post-*Lexecon* world has now created such anomalies as the one recently occurring in the Panel's multidistrict docket dealing with the December 20, 1995 air crash near Cali, Colombia, that resulted in the deaths of 152 passengers and eight crew members. In certain of that litigation's constituent actions, I reiterate, the transferee court was unable to order self-transfer even though all parties agreed on its desirability.

Section 3 of H.R. 2112 also provides for removal from state court to federal court of related litigation arising from the same, single accident. This would be a new device, carefully drawn in the best tradition of cooperative and voluntary federalism, to allow use of the federal judicial forum to deal with dispersed related actions arising out of a single mass accident. It would satisfy a need for resolution in a single forum that state court systems are constitutionally unable to fulfill, because of limits on the states' ability to exercise personal jurisdiction over all victims and defendants. It is not, therefore, rooted in the outmoded diversity jurisdiction justification of avoidance of state court prejudice against out of state litigants.

The draftsmen are to be commended on their balancing efforts and their sensitivity to concerns about both usurpation of state jurisdiction and burdensome expansion of federal diversity jurisdiction. As to the states' interests, it should be noted that the new removal provisions are limited, first of all, to state court cases arising from a single accident and only where related actions are already pending in federal court. No effort is made to make minimal diversity jurisdiction available to other kinds of mass torts such as those arising from asbestos exposure or silicone breast implants. The limited new jurisdiction creates no new federal substantive law. Moreover, it establishes a presumption in favor of a novel measure-remand for compensatory damage determinations from federal to state courts-when a claim was originally filed in state court but then removed to federal court under the new jurisdiction, and a decision has been reached upholding liability. Finally, in many mass accident dockets, the bulk of civil actions arising therefrom will already be pending in federal courts.

As for the federal courts' interests in this equation, it should be reiterated that the new jurisdiction remains narrow in scope, and that the issues addressed in the removed state cases will for all practical purposes be largely identical to those already being addressed in the cases originally filed in federal court. And because Section 3 of H.R. 2112 couples the diversity threshold with other changes (such as those authorizing a consolidated trial of liability and punitive damages issues and those relating to the selection of a single choice of law for all actions), any increase in the federal caseload associated with the expansion of diversity jurisdiction in the context of Section 3 of H.R. 2112 will be more than offset by the efficiencies gained through improved consolidation.

Absent the availability of a single federal forum for the adjudication of mass accident cases, wasteful duplicative litigation is unavoidable. The reports that I receive

from individual transferee judges in the multidistrict "trenches" speak far more adequately than can I to the nature and severity of the problem. A couple of examples will serve to illustrate its range and extent. Judge William L. Standish (W.D. Pennsylvania) is the transferee judge in the Panel's docket arising from the USAir crash near Pittsburgh, Pennsylvania on September 8, 1994, that resulted in the death of 132 passengers and crew members. He reports that in addition to the federal actions centralized before him by the Panel for pretrial proceedings, 22 other actions were pending in the Cook County, Illinois Circuit Court. These actions were not removable to federal court or otherwise transferable by the Panel because an individual resident of Illinois was joined as a defendant in each of those cases, thereby destroying complete diversity between the cases' plaintiffs and defendants. He writes:

> Because the Cook County cases remained in the Illinois state court, there has been considerable duplication of work by the attorneys involved, some of whom represent parties in both jurisdictions. Two steering committees for plaintiffs were appointed; attorneys have attended conferences, arguments and hearings in both Pittsburgh and Chicago and both courts have been required to rule on various discovery and other issues, sometimes inconsistently, despite the fact that the judges involved communicated extensively with each other and, at times, had joint hearings or arguments on discovery motions. The inconsistent rulings, for the most part, resulted from differences in the Federal and Illinois Rules of Civil Procedure relating to discovery, but they have caused inconvenience, additional expenses and the expenditure of additional time by the attorneys in the conduct of discovery.
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> When discovery concludes, in the near future, motions for summary judgment may be filed in both courts by the same parties, and it is possible that rulings on these motions may differ.

Another judge, Panel member Louis C. Bechtle, commenting on how Section 3 of H.R. 2112 might have helped him in his role as a settlement judge in the MDL (multidistrict litigation) arising out of the fire disaster that took 97 lives and injured hundreds more at the Dupont Plaza Hotel in San Juan, Puerto Rico, on New Year's Eve, 1986, writes that:

> Citizens of Puerto Rico could not become parties to this MDL litigation because of a lack of diversity with the principal defendants. This was especially unfortunate because Puerto Rico does not provide for jury trials in such cases. The result was that the claimants who could not be in the federal MDL litigation would not have the full benefit of the federal discovery, and other processes related to a jury trial, yet those citizens were the victims of the same catastrophe as those who were citizens of states other than Puerto Rico and whose cases were being administered in the MDL. Under the new legislation those persons could intervene in the MDL proceedings and fully participate in all phases of the litigation including the settlement course, on the same basis as other claimants. Also because of the proposed removal provisions, the defendants could defend in one forum at one time and under the same standards. Considerable financial and professional resources of all parties and the state, territorial, and local governments would have been achieved had the proposed legislation been in place at that time.
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> . . . I would also add that in my conversations with . . . citizens of Puerto Rico regarding the Dupont Plaza fire, nearly all would have preferred to be included in the MDL for the pre-trial proceedings including full discovery and ultimate disposition.

I want to further emphasize here that when state cases such as these are tried in their respective jurisdictions, a myriad of additional costs and duplications arise as a result of trial of the same liability issues in both state and federal court. Ultimately, it must be remembered, the plaintiffs' lawyers and the defendants' lawyers always get paid in full for their services. It is rather the parties on both sides who pay the price for the system's deficiencies. Defendants, and their insurance companies, expend vast sums relitigating the same issues in forum after forum. And the victims of these horrible tragedies and/or their survivors, whose lives have already been touched by unfathomable sorrow, suffer the final indignity of seeing sums otherwise available to assuage their losses being consumed by unnecessary transactional costs.

The third major area of improvement provided by Section 3 of H.R. 2112 is found in its directive to the transferee court to select a single source of substantive law to apply to all actions arising from the same accident. The lawyers among you on this Subcommittee may well recall "Conflicts of Law" as one of your most difficult and challenging law school courses, and well you should. For the conflicts analysis,

especially in the context of mass disaster litigations, where plaintiffs may reside and file suit in different states, where the accident may have occurred in yet another, and where defendants are located still elsewhere, is among the most demanding and time-consuming tasks facing any lawyer or judge.

I would like to illustrate this point with an example taken from the multidistrict docket arising from the May 25, 1979 crash of a DC-10 jet airplane, designed and built by McDonnell Douglas Corp. (MDC), and operated by American Airlines (American), which was scheduled to fly from Chicago, Illinois, to Los Angeles, California. The plane crashed shortly after take-off, killing all 271 persons aboard and two persons on the ground. Eventually 118 wrongful death actions were centralized by the Panel in the Northern District of Illinois. Among the many issues addressed by the transferee court in this docket was whether punitive damages would be allowed in the actions. The centralized cases were originally filed in Illinois, California, New York, Michigan, Hawaii and Puerto Rico federal district courts by plaintiffs and their decedents who were residents of California, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Michigan, New Jersey, New York, Vermont, Puerto Rico, Japan, the Netherlands and Saudi Arabia. MDC was a Maryland corporation, having its principal place of business in Missouri. Plaintiffs contended that MDC's conduct in the design and manufacture of the DC-10 was egregious, and that MDC's misconduct occurred in California. American was a Delaware corporation whose principal place of business, because of a move from New York to Texas that happened to occur during 1979, was in dispute. The plaintiffs contended that American's conduct regarding the maintenance of the DC-10 was also egregious, and that American's misconduct occurred in Oklahoma, the site of American's maintenance base.

Both defendants moved in a pretrial motion to strike the claims for punitive damages on the ground that such claims failed to state legally sufficient claims for relief. Almost everything related to this matter was in dispute: whether certain states allowed punitive damages, the choice-of-law theories to be used regarding certain states, and the results of the application of the choice-of-law theories which were to be used. In conducting its analysis, the transferee court had to consider the substantive law of the place of the disaster, the law of the place of manufacture of the aircraft, the law of the primary place of business of MDC, the law of the primary place of business of American, and the law of the place of maintenance of the aircraft. As if this were not a sufficiently daunting task, the court then had to apply the separate choice-of-law rules of each state where a constituent action had originally been filed. The "good" news for the poor transferee court was that in this docket there were "only" six such jurisdictions.

The transferee court thus labored on. Under the Illinois "most significant relationship" test, the court found that the law of the principal place of business should prevail with regard to the punitive damages question. Finding that New York was American's principal place of business at the time of the crash and did not allow punitive damages, and that Missouri, MDC's principal place of business did, the court, ruling in the cases filed in Illinois, allowed the motions to strike punitive damage claims against American but not against MDC. Turning then to the cases filed in California, and applying that state's "comparative impairment" test, the transferee court held that the policies of the state of the principal place of business would be impaired more than the policies of the state of misconduct if those policies were not applied. Thus the court again allowed the motion to strike punitive damages with regard to American but not MDC. Additional analyses were required, before reaching the same results, with respect to the cases originally filed in New York, Michigan, Puerto Rico and Hawaii.

There is quite simply no good reason why courts and parties should be subjected to the uncertainties, delays and expense created by a need for this kind of repeated choice-of-law analysis. Victims of mass torts occurring in a single accident should have similar claims decided in a similar fashion, and should receive prompt compensation for their injuries with a minimum of litigation costs. Under the choice-of-law provisions of Section 3 of H.R. 2112, the transferee court undertakes one multifactor analysis leading to the designation of a single jurisdiction whose substantive law is to be applied to all other actions arising from the same accident. The transferee court is also given the flexibility to order, in those few situations where it might otherwise be appropriate, the application of additional sources of law with respect to a party, claim or other element of an action. The choice-of-law resolution remains a complex process, but it is a process that is much simplified, much less costly, and able to provide certainty to all affected parties, counsel and courts. Finally, the bill's provision that the choice of substantive law adopted by the transferee court continues to control in cases returned to federal or state courts for deter-

mination of compensatory damages ensures that those courts will be spared the need to themselves address the conflicts of law issues.

Apart from the individual merits of these three improvements incorporated into Section 3 of H.R. 2112, there are also significant synergistic benefits arising from operation of the provisions in tandem. For example, a single trial addressing the common liability issues present in all cases arising from the same accident (regardless of where originally filed), and using the same source of substantive law, will go far in ridding our justice system of the scourge of forum shopping by both plaintiffs and defendants. Incredible savings can also be achieved through the concentration of any appellate proceedings. To illustrate, a single Death on the High Seas Act issue in the multidistrict litigation resulting from the shooting down of the Korean Air Lines plane on September 1, 1983, was whether pre-death pain and suffering was recoverable. This issue was addressed by the Supreme Court and three different circuit courts of appeal after numerous district courts had faced related evidentiary and reasonableness issues. It took fifteen years to resolve a legal issue that was common to all plaintiffs with respect to that tragedy. The 1979 air crash in Chicago referred to above offers another example. The appellate court, while "generally agreeing with the district court regarding which states allow punitive damages and the choice-of-law theories to be used," reached a different result in applying those theories. Fortunately, review was confined to one circuit, but this is by no means guaranteed in an environment such as that currently existing, where actions must be remanded for trial and the only mechanism for review of a transferee court's ruling on a motion to dismiss punitive damages claims would be that of interlocutory appeal-a process occurring at the considerable discretion of the appellate court with jurisdiction over the transferee court.

In concluding, I would briefly like to make two final points. The first, as evidenced by the dates of the mass disasters to which I have specifically alluded in my remarks (air crashes in 1979, 1983, 1994 and 1995, and a hotel fire in 1986), is that the problems posed by the conduct of complex litigation arising from single incident accidents are not new ones. The second point, flowing from the first, is that the solutions found in Section 3 of H.R. 2112 are themselves not new proposals. To the great credit of this Subcommittee and the House of Representatives, three times in the last ten years bills substantially similar to Section 3 of H.R. 2112 have passed the House only to die in the Senate. No better demonstration of the bipartisan appeal of the solutions found in Section 3 of H.R. 2112 can be made than to cite the history of those past bills. H.R. 3406, from the 1989–90 101st Congress, and H.R. 2450, from the 1991–92 102nd Congress, were introduced, respectively, by Democratic Congressmen Robert W. Kastenmeier and William J. Hughes, and passed the House at a time when members of the Democratic Party were in the majority. It is interesting to note that Congressman Jack Brooks from Texas submitted a very thorough and supportive report on this precise bill in June 1990. Similarly, Section 7 of H.R. 1252 (the Judicial Reform Act of 1997), from the 1997–98 105th Congress, passed the House at a time when the Republican Party was in the majority—Section 7 was initially introduced during the 105th Congress by Republican Congressman F. James Sensenbrenner, Jr., as a free-standing bill before being included in H.R. 1252.

Again, thank you very much for the opportunity to testify today. I would be pleased to answer any questions you may have.

Mr. COBLE. Mr. McLaughlin.

STATEMENT OF THOMAS J. MCLAUGHLIN, ATTORNEY-AT-LAW, ON BEHALF OF THE BOEING COMPANY

Mr. MCLAUGHLIN. Thank you, Mr. Chairman, Mr. Pease. I am here, as you indicated, representing The Boeing Company, which on unfortunate occasions has had the opportunity to gain some practical experience with the problems and inefficiencies that multiple lawsuits in multiple jurisdictions can create.

We believe that H.R. 2112 will significantly reduce many of these problems. As you know, multiple lawsuits in different courts increase the litigation costs for both plaintiffs and defendants, burden the witnesses and the parties with duplicative discovery, produce inconsistent judicial rulings on identical issues, delay resolution of lawsuits, and waste judicial resources.

The courts have been consolidating cases to the extent possible, normally with the full support of the parties, and have demonstrated the benefits that can be achieved from even partial consolidation. H.R. 2112 addresses the two main impediments to full consolidation. First, section 2 addresses the inability following the Lexecon decision to consolidate cases within the Federal system for trial on common issues.

And section 3 addresses cases that currently must remain in State courts because of limitations in Federal statutes on jurisdiction and removal. I noticed with interest in Judge Nangle's comments a letter that he quoted at least part of from the judge handling the multidistrict litigation arising out of the USAir crash at Pittsburgh.

I have been intimately involved in that and quite familiar with the additional burdens that are created by the fact that we have cases pending in two jurisdictions, one in State court and one consolidated by the MDL panel in Federal court. Just yesterday, Judge Standish had to spend some of his time reviewing a 200 page document that one of the defendants was refusing to produce, a document that the other judge had already ordered produced. For some reason we needed to have a second ruling on that.

This is wasteful, not only of the judge's time but the attorneys and the parties, and the costs are ultimately born by the parties themselves. The reason there are, by the way, two sets of lawsuits there is that the plaintiffs in the Cook County proceedings chose to sue an individual defendant, a maintenance person from the airline, literally served him with a summons alleging that he personally was responsible for this tragedy, and, because of the fact that he was an Illinois resident, the cases could not be removed to Federal court.

The additional burden that will be created by these additional cases in Federal court will really not be significant because the cases are in Federal court already and being handled by the MDL transferee judge. To the extent that damages must be resolved by trial, in general those will be returned to the court in which they were originally filed. So that will not provide an additional burden.

Finally, section 3 includes a uniform choice of law procedure. A uniform procedure could significantly reduce legal costs in these cases, but we feel that the uniform procedure that has been adopted in this bill, trying to apply a single law to every single issue in the case, is an unwise choice. There should be separate laws selected for the separate major issues in the case. Damages do not need to be governed by the same law that governs the liability standard applicable to Defendant A or Defendant B.

In closing, Mr. Chairman, thank for your time. I would be glad to answer any questions.

Mr. COBLE. I was going to mention this when I introduced you, Mr. McLaughlin. Several moons ago I was stationed with the Cost Guard in the majestic Queen City of the Northwest and have fond memories of your town.

[The prepared statement of Mr. McLaughlin follows:]

PREPARED STATEMENT OF THOMAS J. MC LAUGHLIN, ATTORNEY-AT-LAW, ON BEHALF OF THE BOEING COMPANY

SUMMARY

- Mass tort accidents commonly result in numerous lawsuits filed in several different states, and in both state and federal courts.
- Boeing has had practical experience with the problems and inefficiencies such lawsuits can create, and believes that H.R. 2112 will significantly reduce many of these problems.
- Multiple lawsuits in different courts can:
  - increase the litigation costs of both plaintiffs and defendants;
  - burden witnesses and the parties with duplicative discovery;
  - produce inconsistent rulings on identical issues;
  - delay resolution of lawsuits; and
  - waste judicial resources.
- Courts are currently consolidating cases to the extent they can under existing law—normally with the full support of the parties—and have demonstrated the benefits that can be achieved by even partial consolidation.
- H.R. 2112 addresses the two main impediments to full consolidation:
  - the inability—following the Lexecon decision—to consolidate cases within the federal system for trial of common issues as well as for pretrial proceedings; and
  - cases that currently must remain in state courts because of limitations in federal statutes on jurisdiction and removal.
- The additional burden on federal courts will not be significant, since most mass tort accidents generate federal proceedings anyway, and cases consolidated under H.R. 2112 may be remanded, where appropriate, at the time individual damage trials become necessary.
- A uniform choice-of-law procedure will significantly reduce legal costs in these cases, but:
  - there should be no requirement that all issues are controlled by a single law;
  - there should be a set of presumptive rules applicable to the various categories of issues likely to arise.

STATEMENT

Mr. Chairman and Members of the Subcommittee,

My name is Thomas J. McLaughlin. I am a partner at the Seattle, Washington law firm Perkins Coie LLP. I have represented The Boeing Company for many years in litigation arising from airplane accidents.

I am pleased to appear before the Subcommittee to testify on H.R. 2112, the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999." Boeing has had some practical experience with lawsuits of both types addressed by this legislation. We have experienced firsthand the procedural problems these lawsuits can create, and we believe this bill will go a long way toward solving several of these problems. We are therefore supporting the bill. I hope that testimony from the practical perspective of a litigant in these types of lawsuits will assist the Subcommittee in its consideration of the bill.

H.R. 2112 is applicable generally to multiple lawsuits arising from a single accident. The bill would eliminate two major impediments to consolidation of these lawsuits in a single forum—(1) limitations on the ability of the federal courts to consolidate cases that are within the federal system; and (2) the inability to consolidate cases that are outside of the federal judicial system.

Although air travel is one of the safest forms of travel, aviation accidents can and do occur. In such accidents, the injured passengers and crew typically are from numerous states and sometimes foreign countries. These individuals, or their families, hire their own attorneys. Often these attorneys reside in the plaintiff's hometown. Just as often, lawyers are hired who specialize in aviation and mass tort lawsuits and who may practice in cities far removed from the plaintiffs' residences. The var-

ious plaintiffs' lawyers usually file their lawsuits in various states, in both federal and state judicial systems. Typically, the forums in which suits are filed include (1) states in which one or more plaintiffs reside; (2) major cities such as New York, Los Angeles, and Chicago (where the specialist aviation attorneys have their offices); (3) forums where jurisdiction happens to exist over all the defendants a particular plaintiff wishes to sue; and (4) the forum in which the accident happened. In other words, the combination of a large number of plaintiffs with different residences, several sets of lawyers with offices in different cities, and various places where suit can possibly be filed typically results in lawsuits being filed in a multitude of different states.

Aviation accident lawsuits also tend to involve multiple defendants. The defendants sued by plaintiffs typically include the airline operating the airplane, the manufacturer of the airplane, and the manufacturers of the engines or other subcomponent parts suspected of being a cause of the accident. In addition, and depending upon the circumstances of the particular accident, plaintiffs may add defendants like the company that provided maintenance or overhaul services for the aircraft, the company that trained the flight crew, or even the U.S. government on claims such as negligence by the flight controller or weather-reporting service.

Thus, it is common after a serious accident to have many separate lawsuits filed, in several states, in both state and federal courts, with many different sets of plaintiffs' lawyers and several different defendants.

Despite this multiplicity of suits, the principal issue that must be resolved first in each individual lawsuit is virtually identical: *Is one or more of the defendants liable?* Indeed, in lawsuits arising out of major aviation disasters, it is common for the liability question to be bifurcated and resolved first, in advance of any trial on individual damage issues.

The waste of judicial resources—and the costs to both plaintiffs and defendants—of litigating the same liability question several times over in separate lawsuits can be extreme. Diverse sets of lawyers would normally be involved in each lawsuit, reflecting the different plaintiffs and different defendants in the suit. Different expert consultants and witnesses may be retained by the different plaintiffs' lawyers handling each case. The court in each lawsuit can issue its own subpoenas for records and for depositions of witnesses, potentially conflicting with the discovery scheduled in other lawsuits. Critical witnesses may be deposed for one suit and then re-deposed by a different set of lawyers in a separate lawsuit. Identical questions of evidence and other points of law can arise in each of the separate suits, meaning that the parties in each case may have to brief and argue—and each court may have to resolve—the same issues that are being briefed, argued, and resolved in other cases, sometimes with results that conflict.

From this it is apparent that consolidation of multiple cases arising out of the same major accident would be efficient, would reduce delay, and would reduce the expense to the parties and to the courts. As one might expect, consolidation is already occurring—to the extent it can under existing rules. It has been our experience that courts will consolidate lawsuits stemming from the same accident to the fullest extent possible under the current rules, normally with the support of all parties. The problem is not a dispute over *whether further consolidation is desirable, but rather the lack of a legal mechanism or procedure to do so.*

Federal courts have for many years strived to achieve the benefits of consolidation. They have used existing rules and common law principles to transfer lawsuits to the most convenient forum within the federal court system or, in the instance of foreign accidents having little connection with the United States, to dismiss lawsuits upon conditions that permit refiling of the claims in a more convenient foreign forum, where other lawsuits may already be pending.

Even the partial consolidation possible under the current rules has proven tremendously beneficial in reducing delays, litigation costs, and the drain on court resources. In such cases, the courts frequently establish a steering committee from among the various plaintiffs' lawyers to act as lead counsel, who then divide up among themselves the discovery motion and briefing tasks in the manner most beneficial and efficient for them. This efficiency reduces the burden on plaintiffs. Discovery is coordinated by the steering committee and the results are analyzed and shared among all parties at the same time. Plaintiffs in consolidated cases are often able to use the same liability consultants and experts, producing savings on one of the largest expenses of modern-day tort litigation. Disputed issues regarding choice of law, evidence, etc. are briefed, argued, and decided once with a uniform result, rather than separately in different lawsuits with possibly conflicting results. The consolidation is usually ordered in a forum that is most convenient for the majority of the parties and witnesses, again reducing delay, the expenses of travel, and other costs.

However, the consolidation that can be achieved by the federal courts under existing rules is incomplete. The basic benefit that we see to H.R. 2112 is that it will improve the federal judiciary's ability to fully consolidate suits arising out of the same major accident.

Section 2 of the bill, addressing the first of the impediments I mentioned earlier ("limitations on the ability of the federal courts to consolidate cases that are within the federal system"), would permit lawsuits consolidated for pretrial purposes by the Judicial Panel on Multidistrict Litigation before a single federal district court judge to be consolidated for all purposes, including trial. Currently, mass tort and other kinds of related cases "involving one or more common questions of fact" filed in different federal courts are often consolidated through the multidistrict litigation ("MDL") procedure under 28 U.S.C. § 1407. However, actions may be consolidated under Section 1407 only for "pretrial proceedings." Trial of common issues such as liability, or punitive damages, cannot now take place in the consolidated forum (or "transferee court") under Section 1407. This limitation can be extremely adverse to the interests of the litigants and the courts. There are obvious efficiencies to be gained from trying the common questions in a single forum, before a court that has become thoroughly familiar with the factual and legal issues in the lawsuit through the pretrial process.

Prior to 1998, this often undesirable and inefficient limitation of the MDL procedure was frequently countered by asking the transferee court before which the cases were pending for coordinated pretrial proceedings under Section 1407 to utilize another section, 28 U.S.C. § 1404, to transfer all the actions to itself for trial. However, Section 1404 is itself subject to substantive as well as jurisdictional and venue limitations. More significantly, the Supreme Court in 1998 ruled that a transferee court may not transfer cases to itself for trial. The Court in the Lexecon decision focused on a portion of Section 1407 that requires that each action consolidated for pretrial proceedings "shall be remanded by the [MDL P]anel at or before the conclusion of such proceedings to the district from which it was transferred unless it shall have been previously terminated." The end result, post Lexecon, is that a transferee judge cannot transfer all cases to itself or to another efficient single location.

The partial consolidation possible in 1999 certainly produces a significant measure of efficiency and cost-reduction benefits for the litigants as well as the courts. What is needed is a statutory revision that will permit a transferee court to do what it used to before the Lexecon decision.[1] H.R. 2112 will do this.

Section 3 of H.R. 2112, addressing the second major impediment to consolidation of lawsuits in a single forum mentioned above ("the inability to consolidate cases that are outside of the federal judicial system"), is applicable to multiple lawsuits filed in both state and federal courts arising from accidents in which twenty-five or more people have been killed or seriously hurt. Current federal statutes permit some, but not all, cases arising out of a single major accident to be filed in federal court, and permit some, but not all, such cases filed in state court to be removed to federal court.

The result is that some, but not all, cases are consolidated. This happens not because full consolidation is undesirable, but because current federal statutes restrict the ways in which consolidation can occur—apparently without any intention to limit consolidation. For example, plaintiffs who reside in the same state as any one of the defendants cannot file their cases in federal court because of lack of complete diversity of citizenship, even if all parties to the lawsuit want the case consolidated. This problem arose in connection with the Air Florida 737 that crashed into the Potomac River in 1982, after taking off from National Airport on a flight to Florida. In that case, the Florida citizens could not sue the Florida-based airline in federal court.

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[1] Many kinds of litigation fit the § 1407 profile, as is evident from the sheer number of actions transferred by the MDL Panel over the course of its thirty-year history. Between 1968, when Congress enacted Section 1407(a), and September 30, 1998, the last year for which complete figures are available, a total of 140,867 civil actions were "[s]ubjected to Section 1407 [p]roceedings." Administrative Office of the United States, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1998, at 33 & Supp. Tables S–21, S–22. Of these, 121,823 were transferred from one district to another for "coordinated or consolidated pretrial proceedings"; the other 19,044 actions were originally filed in the transferee district, *id.*, though not necessarily assigned when filed to the eventual transferee judge. Almost 12% of the total number of transferred cases, or some 16,594 actions, were transferred pursuant to § 1407 in the twelve months ending September 30, 1998.

Of the 140,867 civil actions referenced above, 83,107 were terminated by the transferee courts. Only 4,952 were remanded by the MDL Panel to the transferor courts for trial. As of September 30, 1998, 52,529 actions were still pending in fifty-one transferee district courts. *Id.*

For those cases that cannot be brought into the federal system, no legal mechanism exists by which they can be consolidated. State courts cannot transfer cases across state lines. Similarly, no state court can transfer a case it may have arising out of a particular accident to the federal court in which the federally consolidated cases arising out of that accident are pending; state courts cannot expand federal court jurisdiction. If full consolidation is to occur, it must be as a result of federal legislation.

I do not believe that full consolidation will significantly increase the burden on federal courts, especially as compared to the benefits obtained. As I have mentioned, partial consolidation of these types of cases is already occurring and it would be rare if a major accident did not result in some consolidated federal cases. (Indeed, H.R. 2112 would be inapplicable if no case is filed in or removed to federal court.) It is therefore not a question of whether federal courts should be burdened with litigation arising out of major accidents—they already are—but rather whether we will permit the federal courts to handle all cases arising out of that accident efficiently.

Finally, I believe that enactment of a uniform federal choice-of-law rule will significantly reduce the legal costs for all parties, and the burden on the courts, in multiparty, multiforum lawsuits. Currently, even in cases consolidated in the federal courts under existing rules, the courts must apply the choice-of-law rules of the forum from which each case was transferred (i.e., where it was originally filed). The courts must then apply these various choice-of-law rules separately to each major issue in the claims against each defendant. With cases originally filed in several different forums, each of which may have a unique choice-of-law rule, the courts and the parties face a truly daunting task. Speaking from experience, I can tell you that the amount of time and money spent in briefing and arguing choice-of-law issues in such cases can be staggering. It is also difficult for our busy courts to find the time to work through the stacks of briefing and the arguments that are typically necessary on this issue. And settlement discussions can be delayed and hindered by confusion or uncertainty about which law will control the claims, thereby prolonging the entire litigation process.

However, we do not believe that the selection of a single law to govern all issues in all the lawsuits would be a fair or proper result. Thus, we are opposed to H.R. 2112's choice-of-law section as currently drafted. Moreover, we believe that the list of "factors" and the "relative importance" test will not achieve the desired goal of simplicity and predictability but will instead increase the uncertainty and expense associated with the selection of applicable laws.

We favor enactment of a set of presumptive choice-of-law rules applicable to the various issues that typically arise in cases covered by H.R. 2112. Any lawsuit has a number of discrete legal issues, such as who has standing to sue in a wrongful death case, the standard of liability to be applied to each defendant, the elements and measure of recoverable damages, the availability of punitive damages, etc. Some of these issues are "common issues" in the sense that they will ultimately be decided by a single jury in a consolidated trial in the transferee court. For example, the legal standard for imposing liability on defendant X should be the same in consolidated claims by plaintiffs A, B, etc. Otherwise, the jury in the consolidated trial will have to evaluate defendant X's conduct against two or more different standards and may find defendant X liable to plaintiff A but not to plaintiff B.

We favor selection of the law of the place where the alleged misconduct occurred to govern the common issues of liability and punitive damages. This presumptive rule is likely to result in different laws being applied to different defendants. This will not create a problem, however, because juries already apply different legal standards to different types of defendants. For example, product manufacturers can be found strictly liable for having delivered a defective product, air carriers can be found liable for failure to exercise the highest degree of care, and repair facilities can be found liable for failure to exercise ordinary care.

Another group of issues is unique to each case and, where appropriate, will be decided by separate juries in separate trials. For example, each plaintiff's claim for compensatory damages involves presentation of evidence unique to each particular case, such as information about employment earnings and relationships with surviving relatives. Such compensatory damage trials will typically take place in the transferor court after remand from the transferee court. Thus, different laws can be applied to different claimants without any risk of jury confusion or inconsistent results.

Over the years we have advocated adoption of preemptive federal legislation that would apply a uniform set of damage rules to all passengers. Absent such a uniform federal standard, we favor selection of the law of the domicile of the person who was injured or killed to govern the elements and measure of plaintiff's compensatory damages. Thus, in a wrongful death case, the law of the state of decedent's domicile

would determine the proper plaintiff (e.g., must the claim be filed in the name of the estate administrator), the relatives entitled to receive compensation (e.g., under what circumstances can a sibling be awarded damages), the available elements of recovery (e.g., is loss of consortium recoverable), and the proper measurement of each recoverable element of damage (e.g., what method is used to discount future losses to a present value).

Application of domicile law will not create inefficiencies. In fact, in many, if not most, cases, compensatory damage trials will take place in court in the plaintiffs' domiciles, and the attorneys and judges who are involved will already be familiar with the local law. Even when the trial takes place in a state different from the plaintiff's domicile, the use of pattern jury instructions from the domicile state makes application of the selected law relatively easy.

Thank you, Mr. Chairman, and other members of the Subcommittee for this opportunity to address you on H.R. 2112. At this time, I would be pleased to answer any questions you may have.

PARTNER, SEATTLE OFFICE

1201 Third Avenue, Suite, 4800
Seattle, WA 98101–3099
Web site: www.perkinscoie.com
Phone: (206) 583-8483
Fax: (206) 583-8500
Email: mclat@perkinscoie.com

AREAS OF EMPHASIS

- Product liability
- Aircraft accident litigation

REPRESENTATIVE TRANSACTIONS/CASES

- USAir 737 accident, Pittsburgh (1994)
- United Airlines 737 accident, Colorado Springs (1991)
- Lauda Air 767 accident (1991)
- Japan Air Lines 747 accident, Japan (1985)
- USAir BAe-146 accident, California (1987)
- Korean Air Lines 747 Flight 007 accident, U.S.S.R. (1983)
- Air Florida 737 accident, Washington, D.C. (1982)
- Litigation arising from general aviation accidents
- Product liability litigation related to medical devices
- Product liability prevention counseling for manufacturers of various types of products
- State and federal legislation relating to tort and product liability

RELATED EXPERIENCE, SPEECHES AND PUBLICATIONS

The Boeing Company, Aerodynamicist, 1969-72
Co-author, "The Manufacturers' Perspective on the Modern Application of the Warsaw Convention and Recent Attempts at Reform," *The Aviation Quarterly* (1997)
Co-author, "Apportioning the 'Indivisible': Comparative Liability," *Gonzaga Law Review* (1991-92)

EDUCATION

Harvard University, J.D., *cum laude,* 1975
Ohio State University, M.S. (Aeronautical and Astronautical Engineering), 1969
Ohio State University, B.A.A.E., *cum laude,* 1969

ADMITTED TO PRACTICE

Washington
United States Supreme Court
United States Courts of Appeals: Sixth Circuit, Ninth Circuit, District of Columbia Circuit

United States District Courts: Western District of Washington; Eastern District of Washington; Eastern District of Michigan; Central District of California; Northern District of Illinois

THE BOEING COMPANY FEDERAL GOVERNMENT CONTRACTS

The Boeing Company received the amounts listed below from Department of Defense and National Aeronautics and Space Administration contracts.

Year	Amount
1998	$19.879 Billion
1997	$18.125 Billion

Mr. COBLE. Mr. Wolfman, good to have you with us, sir.

STATEMENT OF BRIAN WOLFMAN, STAFF ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP

Mr. WOLFMAN. Thank you. Mr. Chairman, members of the committee, thank you for the opportunity to appear today concerning H.R. 2112. I want to make clear before considering the particular provisions of the bill that we are not opposed to some of the bill's concepts.

For instance, we support a limited overruling of Lexecon, but believe that the bill goes too far in limiting the plaintiff's choice of forum. Initially I want to make two overarching points that I think are important for the committee's consideration.

First, the previous witnesses, at least in the written statements, have stressed that the bill is unobjectionable in part because in many multidistrict consolidations all parties, the defendants and the plaintiffs, would prefer having a consolidated trial in the Federal transferee court. But no one, and surely not us, disagrees with the general proposition that if it is constitutional, parties who consent to trial in the Federal transferee court ought to be able to do so. If that is all this legislation provided, we would have few, if any, concerns. Our concerns are for nonconsenting plaintiffs for whom a trial in the transferee court will be terribly inconvenient or unfair.

Second, most of the support for the bill is grounded on efficiency, consolidating similar cases for trial, avoiding variations in applicable State law and the like. We agree that these concerns are important, quite important, and a limited overruling of Lexecon, as I said, can be justified on that basis. But efficiency alone might be served by the consolidation and federalization of all matters of litigation. It is important to balance the needs of the injured parties and the proper respect for State law and State courts against any efficiencies that might be achieved.

Let me turn to the particular provisions. We support, as I said, a narrowly channeled provision to overrule Lexecon. The problem with section 2 of the current bill—and by the way, that would also therefore refer to section 310 of H.R. 1752, the larger bill that mimics section 2 of H.R. 2112—is that it would allow the transferee court to try the whole case, liability and damages, under essentially unreviewable "interests of justice" and "convenience of the parties" criteria.

So to the extent that the other panelists or members believe that we are opposed to section 2 because it would allow a trial in the transferee court, that is not our position. The problem is that it is vague and would allow trial of the whole case including damages, in the transferee court.

As one of the prominent plaintiffs' mass accident attorneys put it when talking to us about the bill: "Insofar as the *Lexecon* case is concerned, the bills are nothing more than overkill. The bills would appear to change the pre-*Lexecon* practice of effectively giving the transferee plaintiff the option to return to the transferee forum, his or her choice of forum, for determination of damages." In many MDL cases, particularly personal injury cases such as the asbestos cases, mass accident cases, breast implant cases, it would be fundamentally unfair to force plaintiffs to try the damages aspects of their cases in the transferee forum, which might be a continent away from their home and the home of their witnesses.

Indeed, this principle is recognized by section 3 of the bill deal—which with mass accidents—where it makes very clear that the presumption would be that the damages aspect of the case would be tried in the home forum. That might be the intention of the drafters of the bill with respect to section 2; but if that is the intention, we think it should be made explicit, that there would be a presumption in favor of a trial of damages in the transferor or the home forum.

Our full testimony takes up several other issues concerning the role of MDL transferee courts, and I will address just one of them here. In nationwide cases, where the law of many, and sometimes all, of the States is potentially applicable, transferee courts have made pretrial rulings on substantive issues of State law (liability of a particular defendant, whether a particular claim can be asserted, etc.), even though the plaintiffs would ordinarily have the right to make those claims in their home jurisdictions under their own State's law.

These one-size-fits-all rulings are efficient to be sure, but they deprive parties of their State law rights and, in that respect, are an affront to Federalism because they are made without regard to differences among State laws. We believe that the MDL statute should be amended to provide that, absent consent, unless the case has been self-transferred for trial, transferee courts should be barred from making rulings on substantive motions in the consolidated proceedings, unless the issue concerns a Federal issue on a Federal claim.

Now, I want to turn to section 3, briefly, concerning jurisdiction in the mass accident cases. We agree with the proponents of the bill that it often makes sense to consolidate all cases involving a discrete accident, and we agree with the bill's presumption that a case should be remanded to the transferor court after a trial on liability and, where appropriate, punitive damages. We note that section 3 allows compensatory damages generally to be tried in the home forum, which we think would be an improvement with respect to section 2.

I see that my time is up, but let me mention one other thing about section 3. The other concerns are in my written testimony. The bill would bar all appellate review of decisions not to remand

cases to their home jurisdictions for determination of damages. In this respect—no appellate review of no-remand decisions—that would be unprecedented and contrary to the remand provisions of other removal provisions of Federal law. Because of the overriding need in most cases for plaintiffs to try compensatory damages in their home forums, depriving plaintiffs of any appellate review of no-remand determinations is fundamentally unfair. If the bill is to go forward, we urge that this aspect of the bill be removed. Thank you very much.

Mr. COBLE. Thank you, Mr. Wolfman.

[The prepared statement of Mr. Wolfman follows:]

PREPARED STATEMENT OF BRIAN WOLFMAN, STAFF ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP

Mr. Chairman and members of the Committee: Thank you for the opportunity to appear today concerning H.R. 2112, the Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999. Before explaining our concerns about H.R. 2112, I want to describe the basis for our interest in the proposed legislation. I am a staff attorney with Public Citizen Litigation Group, a non-profit, national public interest law firm founded in 1972 as the litigating arm of Public Citizen, a consumer advocacy organization with approximately 150,000 members. The Litigation Group has a longstanding involvement in complex, multi-district litigation, particularly in class actions and mass-tort bankruptcies. Like other lawyers who represent consumers, we have used class actions in situations where litigation of individual claims would be economically impossible.

Because we value the potential for class actions and other litigation to bring justice to harmed consumers, in recent years, we have become involved in fighting improper class action settlements.[1] A large number of those cases—such as the *General Motors* pick-up truck case and the *John Hancock* insurance fraud case—have passed through the Panel on Multidistrict Litigation ("MDL") and were settled in the courts to which the Panel had transferred them (known as "transferee courts"). We have not been involved in litigating the mass accident cases that are the subject of section 3 of the bill, but we nevertheless have some concerns there as well, because of the interrelations between sections 2 and 3 of the bill and because some of section 3's provisions raise issues relevant to our class action and bankruptcy practice.

I want to make clear, before undertaking an analysis of the particular provisions of H.R. 2112, that Public Citizen is not opposed to some of the bill's concepts. For instance, we support a limited overruling of the *Lexecon* decision. But we believe that the bill goes much too far in limiting plaintiffs' choice of forum. The remainder of this testimony, therefore, focuses on the potential undesirable consequences of parts of H.R. 2112 and our suggestions to limit provisions that we believe are too expansive.

I. SECTION 2—OVERRULING LEXECON.

We support a narrowly tailored provision to overrule *Lexecon* v. *Milberg Weiss Berhsad Hynes & Lerach,* 118 S. Ct. 956 (1998), which held that 28 U.S.C. § 1407 did not authorize "self-transfer," and therefore prohibited MDL transferee courts from conducting trials in cases that had been transferred to those courts for pretrial purposes by the MDL Panel. There are certainly situations in which it makes sense for the transferee court, which has overseen discovery and related matters, to conduct a trial on liability and, in rare instances, even damages.

The problem with section 2 is that it goes far beyond simply permitting a MDL transferee court to conduct a liability trial in certain circumstances. Section 2 (i) fails to distinguish between liability and damages (and, therefore, between compen-

[1] *See, e.g., Amchem Prods., Inc.* v. *Windsor,* 521 U.S. 591 (1997), *aff'g Georgine* v. *Amchem Prods., Inc.,* 83 F.3d 610 (3d Cir. 1996); *In re Prudential Ins. Co. of America Sales Practices Litig.,* 148 F.3d 283 (3d Cir. 1998); *Bowling* v. *Pfizer, Inc.,* 102 F.3d 777 (6th Cir. Dec. 12, 1996), *aff'g,* 922 F. Supp. 1261 (S.D. Ohio 1996), *recon. denied,* 927 F. Supp. 1036 (S.D. Ohio 1996); *In re General Motors Corp. Pick-up Truck Fuel Tank Litig.,* 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995); *In re Orthopedic Bone Screw Prod. Liab. Litig.,* 176 F.R.D. 158 (E.D. Pa. 1997); *Clement* v. *American Honda Finance Corp.,* 176 F.R.D. 15 (D. Conn. 1997); *Duhaime* v. *John Hancock Mut. Life Ins. Co., 989 F. Supp. 375 (D. Mass. 1997); In re Ford Motor Co. Bronco II Products Liability Litig., 1995 U.S. Dist. Lexis* 3507 (E.D. La. 1995).

satory and punitive damages); (ii) permits self-transfer, or transfer to any other district, under vague "interest of justice"/"convenience of the parties" criteria, without even requiring that the court conducting the trial be one in which the case could have been brought in the first instance; and (iii) fails to differentiate among the different types of actions that come before the MDL Panel, although that has a profound effect on where those cases should be tried and on what issues a joint trial is appropriate. We now take up these issues in more detail and suggest some solutions.

(a) Limiting Self-Transfer To Those Cases In Which It Is Fair To Plaintiffs.

The problem: The kinds of cases transferred by the MDL panel fall into different categories. At one end of the spectrum are massive cases brought against large business concerns, such as those under the federal antitrust or securities laws. The defendants are subject to suit in many locations and most, and often all, of the applicable law is federal law. Often, as in the antitrust cases, the plaintiff is a large business. Sometimes the plaintiffs have all been harmed in much the same manner, as with investors in federal securities cases. In most of these cases, the liability phase of the trial will focus mainly, if not exclusively, on the conduct of the defendant(s). In such circumstances, self-transfer (or transfer to some other forum) for a liability trial will often make sense. It is even possible, in these circumstances, that the damages phase of a consolidated trial could sensibly be conducted in one court, either because of common issues or because the limited role of the plaintiffs does not make the inconvenience to them so great as to override the efficiencies that are achieved.

At the other end of the spectrum are personal-injury cases, such as asbestos, breast implant, or pedicle screw cases, which present a very different set of issues from those discussed above. The applicable law is almost always state law, which can vary widely on virtually every issue in the case on both liability and damages. That fact alone makes it very difficult, if not impossible, for a single court to conduct proceedings (whether trial, summary judgment, or rulings on admissibility) in a manner that would treat plaintiffs from a wide variety of jurisdictions fairly. The transferee court might not be able to apply one substantive law to all plaintiffs on any, let alone all, issues, because that would deprive the plaintiffs of the law applicable in their home jurisdictions. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 814–23 (1985) (due process forbids application of forum state's law to class members in other states, unless out-of-state class members have significant contacts with forum state).

Moreover, as a factual matter, trying the case in the transferee (or some other) forum could be extremely inconvenient for plaintiffs. In virtually every case, plaintiffs would need to testify at the damages phase of the trial, and the proof of damages (regarding medical issues, lost wages, pain and suffering, loss of consortium, and the like) would generally be from witnesses who live or work where the transferor court is located. Moreover, even with respect to liability, some of the evidence—for instance, evidence concerning medical causation and product identification—would require the plaintiff's presence, and many witnesses would live in the vicinity of the transferor court.

In between the two poles are national consumer class actions involving such issues as insurance fraud, *e.g., Duhaime v. John Hancock Mut. Life Ins. Co.,* 177 F.R.D. 54 (D. Mass. 1997), and defective automobiles that do not involve personal injury. *E.g., In re General Motors Corp. Pick-up Truck Fuel Tank Litig.,* 55 F.3d 768 (3d Cir. 1995). Although these cases involve difficult choice-of-law issues, those issues remain in any forum, since the claims are asserted on a nationwide class basis. On questions of liability, many of these cases resemble the antitrust and securities cases discussed above, as the focus is on the conduct of the defendants. *See General Motors,* 55 F.3d at 811. Moreover, if there are individual issues at the liability phase of a class action—such as whether the plaintiff relied on the defendant's misrepresentations in the insurance fraud context—those issues will, if they can be maintained on a class basis, necessarily be decided in one forum.

The question of damages is different, however, because, in many cases, there will have to be individual damages determinations either through settlement, *see In re Prudential Ins. Co. of America Sales Practices Litig.,* 148 F.3d 283, 295–96 (3d Cir. 1998), or through mini-trials on damages. Again, for the reasons described with respect to the personal-injury cases, it would be unfair, if not unconstitutional, to force all plaintiffs to litigate their damages claims in a single transferee court.

Proposed Solution:

- All transfers for trial, including self-transfers, should take place only if the transferee court (a) is in the forum where the plaintiff resides or another

forum not inconvenient for the plaintiff, and (b) meets the requirements of the general transfer statute, 28 U.S.C. § 1404, which permits a district court to transfer "any civil action to any other district or division where it might have been brought." Part (a) focuses the convenience inquiry on the *plaintiff*, rather than on the "parties," drawing special attention to the party whose traditional right to a choice of forum is being altered. Similarly, part (b) makes clear that a plaintiff should not be sent to a forum for trial in which she or he could not bring suit in the first place. Here, again, the issue is avoiding inconvenience to the plaintiff and eliminating any constitutional concerns. *Cf. Shutts,* 472 U.S. at 814–23.

- In addition, any amendment to section 1407 should establish a presumption in favor of remand to the transferor court and provide that, when self-transfer (or some other transfer) takes place, the transferee court must specify the reasons why that forum is not inconvenient for the plaintiff.

- Moreover, the statute should provide that, to the extent that a case subject to an MDL transfer order is tried outside of the transferor forum, it shall be solely for the purpose of "a consolidated trial on liability and, if appropriate, punitive damages," and that the case "must be remanded to the transferor court for the purposes of trial on compensatory damages, except in extraordinary circumstances specified by order of the transferee court."[2]

(b) Summary Judgment And Other Dispositive Motions.

The problem: The principal purpose of 28 U.S.C. § 1407 is to allow a single court to conduct coordinated discovery, thus realizing greater efficiencies and narrowing the issues for trial. But the statute is broader than discovery—referring to "coordinated or consolidated pretrial proceedings"—and transferee courts rule on partial or complete summary judgment and other dispositive motions. This practice gives us serious concern because it deprives plaintiffs of the opportunity to have the legal issues in their cases decided under their own state laws in the forum of their choice. Again, the principal problem is that the cases that fall into the personal-injury category often involve the state law of the transferor forum and, thus, the transferee court should not, and in many circumstances, constitutionally may not, *see Shutts,* 472 U.S. at 814–23, make one-size-fits-all legal determinations for all plaintiffs regardless of where they reside and where their injuries occurred.

Proposed Solution: The transferee court should be barred from deciding motions of substantive law, except where the underlying claim *and* the motion involve federal law, unless the case has been transferred for trial as well, absent the consent of the parties. If the case has been transferred for trial, the court should be authorized to rule on substantive motions, of course, but limited to motions presenting issues on which the matter has been transferred (*e.g., liability* vs. *damages).*

(c) Settlement in the Transferee Court.

Problem: Another related problem under current practice is the undue pressures to settle in the transferee court. The prime example is the asbestos personal-injury litigation that was transferred many years ago to Judge Charles Weiner of the Eastern District of Pennsylvania. The asbestos litigation is very "mature," and no further liability discovery is necessary. And, yet, as we understand it, the Panel, with the concurrence of the transferee court, has been willing to remand only a small proportion of the cases (involving the most seriously injured plaintiffs) to their home jurisdictions, hoping instead to induce the parties to settle. Although we do not believe this practice is permitted under the statute as written, the problem would certainly be intensified by section 2 of H.R. 2112, which would allow the asbestos transferee court to self-transfer all the cases for "trial," placing the Panel under no obligation to remand the cases to their home jurisdictions at any time for any purpose.

Proposed Solution: There should be a presumption of remand to the transferor court after a specified period of time, for instance, 12 months, or some other time deemed generally sufficient to complete discovery. Another possibility is to require the MDL Panel, when it establishes a transferee court, to specify the period of time for coordinated proceedings not to exceed a specified period set forth in the statute (say, 24 months). The MDL Panel would have the authority to grant an extension for a limited period not to exceed six months (or some other reasonable, but short,

[2] Note that section 3 of the bill discussed below—concerning federal jurisdiction in mass accident cases—provides that liability may be tried in the transferee court, but that damages issues will generally be tried in the transferor federal court or in the state court from which the action was removed.

period) "on the ground that pretrial discovery is ongoing, or for extraordinary circumstances." This solution would prevent courts from holding on to cases that ought to be remanded (or otherwise transferred) for trial.

II. SECTION 3—JURISDICTION AND CHOICE OF LAW IN MASS ACCIDENT CASES.

With regard to section 3 of the bill, we are concerned as a general matter that cases ordinarily litigated in state courts would now be litigated in federal courts. Our concern is not about those cases where the plaintiff chooses to file suit in federal court under proposed 28 U.S.C. § 1369 (although even there we are concerned about expanding the federal docket), but rather with those cases that now could be removed from state court to federal court because of the bill's adoption of minimal diversity. The state courts are competent to handle personal-injury and wrongful death cases, and, although there may be reasons to consolidate cases concerning the same accident in one forum, any incursion on the state courts' traditional jurisdiction should only be made if there is a compelling reason to do so. Moreover, absent consolidation of all mass accident cases by the MDL Panel in one federal court, we see no reason to allow removal of ordihary diversity cases to federal court, as section 3 would permit. In that circumstance, the question is simply whether an individual action ought to be litigated in state court as opposed to federal court, and we are unaware of any compelling justification to deprive plaintiffs of their choice of forum under traditional diversity principles.

We now turn to concerns about particular provisions of section 3.

(a) Remand for Determination of Damages. Section 3(c) of the bill (new 28 U.S.C. § 1407(j)) provides that, in a mass accident case where jurisdiction is based, or could be based, on new 28 U.S.C. § 1369, the transferee court may retain the case for purposes of trial on liability and punitive damages. Section 3(d) of the bill (new 28 U.S.C. § 1441(e)(2)) has the same effect for cases removed from state court. These provisions properly maintain a distinction between liability and compensatory damages, stating that an action "shall be remanded to the district court from which the action was transferred, or to the State court from which the action was removed, for the determination of damages, other than punitive damages, unless the court finds, for the convenience of the parties and witnesses and in the interest of justice, that the action should be retained for the determination of damages." As noted earlier with respect to section 2 of the bill, generally it will be very inconvenient for plaintiffs to litigate compensatory damages in the transferee court. Thus, we support section 3's presumption in favor of remand.

Nonetheless, the bill's "convenience of the parties and witnesses" exception is vague and could require plaintiffs to litigate damages in the transferee court when that would be inconvenient. When it is convenient for the plaintiff to litigate damages in the transferee court, the plaintiff can always consent to do so. Absent consent, we fear that "convenience of the parties and witnesses" may, in some cases, be read to refer to only some of the parties (*e.g.*, excluding the interests of some or all of the plaintiffs). As we suggested with respect to section 2 of the bill, the plaintiff's interest in trying damages in his or her home forum is strong and should be protected by statutory language stating that the case "must be remanded to the transferor court, or to the state court from which it was removed, for the purposes of trial on compensatory damages, except in extraordinary circumstances specified by order of the transferee court."

(b) Appellate Review of Refusals to Remand. Under new 28 U.S.C. § 1407(j)(4) and new 28 U.S.C. § 1441(e)(4), "[a]ny decision . . . concerning remand for the determination of damages shall not be reviewable by appeal or otherwise." These provisions would apply not only to decisions to remand, for which there is analogous precedent, *see* 28 U.S.C. § 1447(d) (remand orders generally not reviewable), but to decisions not to remand, for which there is no precedent of which we are aware. Because of the overriding need in most cases for plaintiffs to try compensatory damages in their home forums, depriving plaintiffs of any appellate review of no-remand determinations is fundamentally unfair. Moreover, because many of these cases will have been removed from state court, there are federalism concerns that also counsel against these provisions. We urge that these provisions be deleted or amended to apply only to decisions to remand.

(c) Choice of Law.

Section 3 of the bill imposes a five-factor choice-of-law test. These factors differ in some respects from those set forth in the Restatement (Second) of Conflict of Laws, § 6, which have been adopted in many states, and those set forth in the American Law Institute's Complex Litigation Project proposal. *See* Fred I. Williams, *The Complex Litigation Project's Choice of Law Rules for Mass Torts and How to Escape Them*, 1995 B.Y.U.L. Rev. 1081, 1089–90 (1995). We do not have a view at this time

about which set of factors is preferable (assuming that Congress may act in this area), but we do believe that the Committee should obtain information about how choice-of-law determinations operate in practice, including the experience in mass accident cases under different choice-of-law formulations, before recommending taking the unprecedented step of imposing one test for all purposes.

In addition, we have the following specific concerns about the bill's choice-of-law provisions:

(i) It is arguable that, at least in some applications, imposing a federal choice-of-law rule is unconstitutional. In a case involving an accident occurring in one state, where all applicable substantive law is state law, it is possible that *Erie RR Co.* v. *Tompkins*, 304 U.S. 64 (1938), requires that a federal court sitting in diversity apply a state choice-of-law rule. That is tenor of the decision in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), which would be effectively overruled by section 3 of H.R. 2112. In a mass accident action transferred under the general transfer statute, 28 U.S.C. § 1404(a), Van Dusen held that the choice-of-law rule of the transferor forum stays with the case when it moves to the transferee court. In so holding, *Van Dusen* relied in part on *Erie's* discussion about the proper apportionment of power between the state and federal spheres in diversity cases, *id.* at 637–39, and noted that applying the transferee forum's choice-of-law rule (much like applying a federal rule) "might conceivably prejudice the claim of a plaintiff who had initially selected a permissible forum." *Id.* at 636 (footnote omitted).

(ii) Section 3's choice-of-law provision would enact a very strong presumption (except in "exceptional cases ") in favor of applying the substantive law of only one state, and that state's law would apply even after the case is remanded to the plaintiff's home jurisdiction for determination of damages. Although this provision could provide some efficiency, it would also override important distinctions among different issues in mass accident cases to the potential detriment of the plaintiffs. Although one state's law might sensibly be applied to issues relating primarily to the defendant's conduct in all cases, other issues, such as statutes of limitations, contributory or comparative negligence, various forms of damages, and other topics bearing a closer relationship to the circumstances of the individual plaintiffs, would not fall into the one-size-fits-all category. We urge the Committee to take a close look at this problem before approving section 3.

In closing, we wish to reiterate that Public Citizen does not oppose some of the basic concepts in this legislation. Nonetheless, we believe that, in significant respects, H.R. 2112 will improperly deprive plaintiffs of the opportunity to try their cases in the forum of their choice. In this regard, the legislation should be narrowed along the lines suggested above. In other instances, further study is needed before Congressional action is taken. I would be happy to answer any questions you may have, and thank you again for the opportunity to appear.

Mr. COBLE. Thank you all, gentlemen. Judge Nangle, let me put a two part question to you. First of all, tell us how the MDL panel operates. That is a very general question. Secondly, if you would, give us examples of the types of cases that are handled by the MDL multidistrict litigation.

Mr. NANGLE. Mr. Chairman, the panel is made up of seven members who are chosen from across the country, all in separate circuits. They are appointed by the chief justice personally. They serve at his will. We have an organization of a group of 20 people who work for the MDL office, the Federal Judicial Center of the Thurgood Marshall building.

We hold hearings every 2 months as an oversimplification because we get volumes of briefs and papers about all of the kinds of cases that we have. We hold these hearings and then after that, we reach verdicts just like you gentlemen do and courts of appeal do as you gentlemen do when you are arriving at decisions on legislation to pass.

To give you that overview, and I don't think that you want too long a speech on it, but here are some of the cases that we handle so that you get the magnitude of what we are talking about here. The fire disaster at the MGM Grand Hotel, a miserable, terrible, horrible event. The Korean Airline disaster, which has been de-

layed, but if we had had this legislation it could have moved measurably faster. The fire disaster of DuPont Plaza Hotel. I would sure like to talk more about that because I think that will cut Mr. Wolfman's heart out. The air disaster of Lockerbie, Scotland. The air disaster near Cove Neck, New York. AmTrack Sunset Limited train crash in Bayou Canot in Alabama. The air crash in Colorado Springs. The air crash near Pittsburgh that Mr. McLaughlin referred to. The air crash at Charlotte. The air crash near Cali, Columbia, which has created massive problems because of Lexecon, up and down the court of appeals and things of that sort. The ValuJet air crash in the Everglades. The air crash off Long Island Sound. That is the TWA flight 800. The air crash near Monroe, Michigan. The air crash of the Ron Brown case in Dubrovnik. The air crash near Iguana, Guam.

I will quickly—so you don't think air crash litigation is all we have. The Agent Orange product liability. The Ivan Boeski litigation. The American Continental Lincoln Savings Corporation litigation with Frank Keating and all of the things that go with that. The Michael Milken and associates securities litigation. The silicon gel breast implant cases. The brand name prescription drugs antitrust litigation. The albuterol litigation. The orthopedic bone screw litigation. The NASDAQ marker maker litigation. The disposable contact lens antitrust litigation that Judge Schlesinger is handling for us. The Norplant contraceptive products liability litigation, the phen-fen cases, the American Family Publishing, and I could go on.

Mr. COBLE. This gives me a good idea. And I thank you for that. Judge, let me put a question to and you to Mr. Wolfman.

I will let Mr. Wolfman go first. Each of you seems to believe that as a practical matter H.R. 2112 will vest more power in a transferee judge to induce settlements. Now, let's assume that is true.

What would be wrong with that? And Mr. Wolfman, I don't mean for a judge to put a gun to a guy's head and say you better settle. When I say "induce," I mean in a reasonable way, encourage settlements.

Mr. WOLFMAN. Let me answer that in a short way and then slightly longer. The short answer is that there is nothing wrong with that. It depends on what the background law is that is encouraging them to settle. I think, as my colleague just to my right indicated, that in the airline cases it is presumed that the cases would go back to the home court for the determination of damages. If that is not the underlying presumption and the underlying presumption is that the transferee court has the power to take up the whole case, that will dramatically alter the settlement value of the case. I don't think there is anything wrong with judges encouraging settlement in appropriate cases, and, in fact, and I think Judge Nangle and I would have disagreements, many of the mass tort cases that Judge Nangle mentioned we have had involvement in. There is no question that those cases are cases that need to be settled on some terms.

The question is on what terms.

Mr. COBLE. Judge Nangle, do you want to be heard on that.

Mr. NANGLE. No, sir.

Mr. COBLE. Mr. McLaughlin—well, strike that. It is my belief that Mr. Wolfman believes that absent a compelling reason, we should not interfere with the ability of a plaintiff to choose a forum under traditional diversity principles. Can you, sir, identify a compelling reason that might change his mind.

Mr. MCLAUGHLIN. I don't know if it would change his mind or not, but I noticed he used the terminology "transferor forum" and "home forum" interchangeably. What we find frequently is that plaintiffs do not pick their home forum. They pick a forum which they believe would be advantageous for their particular kind of case or beneficial for whatever reason for the lawyers they have selected. They will then choose to lock the case into that particular State forum by finding a defendant that will prevent removal.

Mr. MCLAUGHLIN. They may find, as I mentioned in the US Air litigation, a living employee of the airline. In other cases, they have found the estate of a deceased pilot who was the pilot of the accident flight. I believe, for example, in the American Eagle Roselawn litigation that took place—I believe it is already taking place in the recent American accident at Little Rock.

They will sometimes find a subcomponent manufacturer who happens to be a resident, surprisingly, of the State in which they wish to remain, and that blocks removal because if you have a single resident defendant within that State you cannot remove the case under our existing removal laws.

That subcomponent manufacturer technique, for example, has been used in the American Eagle accident at Raleigh. Sometimes they will sue in the principal place of business of one of the principal defendants like the airline or the manufacturer. In some sense, it is hard to complain about that, but in another sense they really picked a forum that is intended to prevent removal from State courts.

So I think the compelling reasons of efficiency that Judge Nangle has so nicely articulated are the compelling reasons and some of the countervailing reasons for maintaining the so-called right to select the State court forum are, in fact, transparent.

Mr. COBLE. That menacing red light has silenced, me so I will recognize the gentleman from Indiana.

Mr. PEASE. Thank you, Mr. Chairman. Judge, I believe I understood that Mr. Wolfman objected to certain of the section 2 provisions as they dealt with, I think as you put it, lack of appellate review of certain decisions. Can you respond to that allegation, number one? Number two, can you tell us what the pre-Lexecon law was for review of the decisions that had been made?

Mr. NANGLE. Well, I don't think there that there is any change made in the review of the law. The pre-Lexecon we have operated under is as follows. If a case is pending, let's say that we have centralized the case before Sara Evans Barker in the State of Indiana. Judge Barker, she has together 25 cases, maybe class actions with thousands of people. When you say cases, you are saying one thing. When you say number of complainants, it is a different story.

In any event, she will make a ruling on a motion for summary judgment and will allow an interlocutory appeal because it is important. It goes up to the circuit court. That is the only route of

appeal. But that keeps four circuits from getting involved, five circuits from being involved. That is the practice.

On motions to remand particularly there are very few—most motions to remand are not appealable. The judge remands they are not appealable orders to start with. But I think Mr. Wolfman and I disagree and I don't know why. He has appeared in front of me. I think I was pretty blasted good to him.

I may be the only judge in the United States who complimented you, right?

But I mean—he says, for example, don't allow the transferee judge to rule on a motion for summary judgment. That is sheer nonsense. If you send those cases all back to 15 different jurisdictions, you are going to have 15 different judges ruling, and they ain't going to all be alike. We know that. They are going to have different rulings.

Number two, and most importantly, a very subtle factor, Nangle doesn't want to handle those cases. And I will tell you most of the judges that I know don't want to devote themselves because, as I say, they are watching over the little picayunish arguments that lawyers have in discovery matters. These lawyers want to take care of the case and do a real good job on it. We check on them and that is what we are doing.

Mr. PEASE. Mr. Wolfman, your thoughts on that subject.

Mr. WOLFMAN. There may be some confusion, so let me clear it up. There is no issue about appellate review under section 2 regarding *Lexecon*. The question that I raised about appellate review had to do with section 3. It would be unprecedented for the decision—not to remand a matter to be not reviewable under the mass accident portion of section 3 of the bill.

Mr. PEASE. So how is that different from the pre-Lexecon situation?

Mr. WOLFMAN. It is not related to Lexecon. It is just that under current Federal practice in questions of removal, a decision not to remand is an appealable decision. This would alter that with respect to the mass accident cases, and mass accident cases only, the ones covered by section 3 of the bill. Judge Nangle is, of course, correct, that the decisions to remand are not appealable generally in the Federal court system.

If I could add one other thing. I just think with respect, again, to my colleague immediately to the right, I think the airline cases are very different from other cases. There is no question that the plaintiffs in the airline cases sue in a whole host of different places. Sometimes they are home forums but sometimes in other places. But if you look for instance at the mass personal injury cases, the mass tort cases, the toxic tort cases, a very substantial majority of those cases are brought in the home forum for purposes of convenience. Again, we have no concern about those cases being consolidated under appropriate circumstances.

The judicial panel, multidistrict litigation, has done terrific work in bringing those cases together, but we do have a concern that they be taken away from their home jurisdiction with respect to the damages determination.

I stress again that section 3 of the bill does make that distinction with respect to the airline cases and the mass accident cases, but

that distinction is not made with respect to section 2 in overruling *Lexecon*.

Mr. PEASE. Thank you. Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Pease. I anticipated that we would have suffered interruptions by voting on the Floor, so I missed that call. I have one more question, and then I will be glad to recognize you if you have additional questions; and permit me to put this question to the three of you.

Judge, I will start with you and work from my left to my right. How complicated or how complex is it to resolve conflicts of law disputes under current multidistrict litigation practice, A; and, B, would H.R. 2112 improve matters in this area or worsen matters?

Mr. NANGLE. First, how complicated is it. We all went to law school, all of us who are lawyers. I thought it was the toughest course that I ever took in law school and it took me years to think that now I know a little bit about it. But I thought we have had this subject discussed by the brilliant judges in this country, Weinstein from New York, Sweet from New York, Manny Real from Los Angeles. All of us agree that it is exceedingly complicated right now. It is somewhat arbitrary. You have got to dance around. This is an improvement.

The reason that I like what we have is because it has been conceived by predecessors of your committee. It has been approved by predecessors of your committee. Mr. McLaughlin's idea may be better. I could sit down and probably five of us write another one. Blaine Merritt might write another one, but it will work. It has been looked over by, I think, Dan Meador. I want to be a little hesitant, but some top notch academics have approved that. That is good enough for me.

Mr. COBLE. Mr. McLaughlin?

Mr. MCLAUGHLIN. As I mentioned in my prepared statement as well as my oral remarks, that is the one section of the bill that we do have some concern about. The notion that a judge, the transferee judge, should try to pretend to be the judge in each one of the original transferor forums and apply that State's choice of law rulings is one that we need to do something about.

It is just entirely too complicated and complex, and most of the judges some way find their way through that mine field and end up miraculously finding that all of those States would have picked a single law to govern a single issue.

But there is no need to apply one State's law to every single issue in the case. With respect to the damages that the plaintiffs are entitled to if you do not have, for example, in an air crash case, you don't have a Federal standard, which we have advocated that in another context. But if you don't have a Federal standard, then we feel that the law of the plaintiff's domicile, the law of the plaintiff's home, is the most logical one to govern damages.

Just because the airplane happened to come out of the sky and land in a particular State, that State's law should not be the one selected to govern everything in the case. That may be the only common denominator among all of the different States involved.

If you end up with that, it is pretty fortuitous and, we feel, in most cases unreasonable. There are some presumptive rules we

have suggested, and we would be glad to provide some alternative language to the committee that we feel would be an improvement.

Mr. COBLE. All right. Mr. Wolfman.

Mr. WOLFMAN. Just very briefly. You can see in our testimony on this latter point that we agree with Mr. McLaughlin. This question of whether you can choose one State's law for the whole case and virtually every single case seems very difficult and perhaps unfair sometimes to the plaintiffs.

I will put it this way: I think it simplifies it. There are issues in a complex litigation that tend to be defendant-oriented and there are other issues that tend to be plaintiff-oriented and, in particular, individual plaintiff-oriented. It just seems awfully difficult to choose one State's substantive law with respect to all of those issues.

Mr. COBLE. We have been joined by the gentleman who represents the Roanoke and the Shenandoah Valley of Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Mr. Chairman, I thank you. I don't have any questions.

Mr. COBLE. Mr. Pease.

Mr. PEASE. Thank you, Mr. Chairman. Just one question, Judge. What have been the practical consequences of the Lexecon decision on the functioning of the MDL panel?

Mr. NANGLE. Well, I guess that I could give you chapter and verse, but that would take too long. There have been a number of cases. I think Fred Motz in Maryland had one of the worst ones. Judge Covello in New Jersey had one where the parties for the most part wanted to agree to have Judge Covello try his case or Judge Motz to try his case.

But you can't just consent. The lawyers can't sign a consent and the judge signs off on it and retain the cases. Most of the time, surprisingly enough, maybe Mr. Wolfman and all, the lawyers want to stay and consent to stay in the transferee courts. I don't know what he is arguing about, to tell you the truth. This would accommodate them. But in any event, getting back to your question, the—it has resulted in the Cali airplane crash, appeals back and forth, and Shelby Highsmith down in Miami has still not be been able to resolve it. There is the ValuJet crash and how old is that now? It is because of Lexecon.

Motz went out, Fred Motz, fine judge from Baltimore, had himself assigned to California so he could hear some motions out there and then reassigned back to Maryland and ultimately got the case back there. I think they settled it that time.

Can you see all of the logistical problems and the costs that result from that? They just go on and on and on. John Feikens has the same problem in Michigan. You don't want me to go through the litany. I will be glad to furnish this committee with a list of all of these horror stories.

Mr. PEASE. Thank you very much. Thank you, Mr. Chairman.

Mr. COBLE. Gentleman and ladies, you give a group of lawyers the luxury of time on our hands as we have now and one more question comes to mind. I just want this for the record. What is the purpose of punitive damages, A; and is this purpose served by allowing the transferee court to retain jurisdiction over the assess-

ment of punitive damages? Judge—and let's do this quickly because the bell just rung.

Mr. NANGLE. This is my opinion, not that of the Judicial Conference. I think——

Mr. COBLE. Just a second, Judge. Okay.

Mr. NANGLE. Punitive damages has as their purpose to deter and halt outrageous, egregious conduct and they are appropriate. But in an airplane crash, 145 people, I don't believe they should give 145 claims for punitive damages. I think one claim is sufficient, adequate, and appropriate under the proper instructions. So I agree with the way that it is being addressed in this 2112.

Mr. COBLE. So you have no problem with the transferee court retaining jurisdiction therein?

Mr. NANGLE. No, sir, not at all because I think we have good judges.

Mr. COBLE. Mr. McLaughlin.

Mr. MCLAUGHLIN. I don't think that I can add anything to that.

Mr. COBLE. Mr. Wolfman.

Mr. WOLFMAN. We agree that liability and punitive damages can often be retained in the transferee court. Our concern is with compensatory damages. The reason is that the punitive damages focuses on the conduct of the defendant. So it can be retained in the transferee court because the potential for inconvenience to individual plaintiffs is very small.

Mr. COBLE. Gentlemen, we thank you all. We thank those in the audience for having patiently endured our hearing. Judge, you mentioned some exhibits that you wanted to make part of the record. Without objection we will receive those.

[The information referred to follows:]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA,
Washington, DC, June 21, 1999.

Hon. HOWARD COBLE, *Chairman,*
Committee on the Judiciary,
Subcommittee on Courts and Intellectual Property
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN AND SUBCOMMITTEE MEMBERS: As we discussed during my testimony last Wednesday, enclosed is a listing of examples of multidistrict litigation wherein Lexecon has raised its hindering head. I am most appreciative of your willingness to help the federal judiciary streamline the adjudication of multiple litigation in a fair and efficient manner. The big winners of enactment of H.R. 2112 will be your constituents, who will reap substantial savings of time and money.

This list was gathered quite hastily and I know there are a number of other dockets facing the Lexecon problem (which is, of course, growing constantly).

Please feel free to contact me if I can be of further assistance.

Kindest regard,

JOHN F. NANGLE *Judge.*

MULTIDISTRICT LITIGATION PROBLEMS AFTER LEXECON

In just one year, *Lexecon* related issues have arisen to hinder the sensible conduct of many groups of multidistrict litigation transferred to a single district for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407. These issues are attributable to the inability of the transferee judge, after Lexecon was decided last year by the Supreme Court, to continue the 30-year practice of transferring actions to himself or herself, or to another district, for trial under 28 U.S.C. § 1404. In addition to causing delay and increased transactional costs - for the parties and the courts, these concerns have caused inefficiency and uncertainty in the conduct of

multidistrict litigation. Examples, based on court orders and correspondence from transferee judges, follow:

THE RULING IN *LEXECON* HAS SUBSTANTIALLY EVISCERATED THE PRACTICAL PURPOSES OF THE MDL ASSIGNMENTS. AFTER ALL, PRETRIAL DISCOVERY AND RELATED PROCEEDINGS SIMPLY SET THE STAGE FOR ULTIMATE RESOLUTION. IN ORDER TO ACHIEVE THE BENEFITS OF CONSOLIDATION, THE ASSIGNED JUDGE SHOULD HAVE THE ABILITY TO CONDUCT A CONSOLIDATED TRIAL ON LIABILITY. SUCH A POWER WOULD GREATLY ENHANCE THE POSSIBILITY OF SETTLEMENT AND, MOST IMPORTANTLY, ELIMINATE THE THREAT OF INCONSISTENT DETERMINATIONS THROUGHOUT THE COUNTRY." *Judge Robert W. Sweet, S.D. New York*

MDL–1023–In re NASDAQ Market-Maker Antitrust LitigationMDL1161-In re Air Crash Off Long Island, New York, an 7/17/96 (Raises complicated issues regarding how to try majority of cases transferred to him from elsewhere. Also absent an interlocutory appeal to the Second Circuit, the parties and numerous district courts throughout the U.S. will face protracted litigation over the applicability of the Death on the High Seas Act.)

TRANSFEREE JUDGE UNABLE TO ORDER SELF-TRANSFER FOR TRIAL EVEN THOUGH ALL PARTIES AGREE ON THE WISDOM OF SELF-TRANSFER FOR TRIAL.

Chief judge Michael Mihm, C.D. Illinois

MML–1087–In re Corn Sweeteners Antitrust Litigation (All parties agree on trial in the transferee district, Plaintiffs recognize 1407 remand followed by 1404 transfer back will be required by *Lexecon.)*

Judge Shelby Highsmith, S.D. Florida

MDL–1125–In re Air Crash Near Calf, Colombia, on 12/20/95 (In June and July of 1998, he was forced to decline self-transfer for trial in cases wherein all parties sought self-transfer and waived remand i) either to be included in a consolidated trial on liability issues, or ii) for a damages trial as well as the consolidated liability trial. Instead he decided i) to defer remand of some actions pending the conclusion of the consolidated liability trial, and ii) in some cases, to suggest that the Panel remand cases to their transferor courts and to recommend that the transferor court retransfer to him for trial.)

Judge John Feikens, E.D. Michigan

MDL–1178–In re Air Crash Near Monroe, Michigan, on 1/7/97 (Prior to *Lexecon,* all parties had agreed for him to preside over a joint liability trial, beginning 9115/98. Thereafter, he planned to proceed with trial for the two nonsettling cases that were originally filed in E.D. Michigan. He has recommended that the Panel remand five other cases to their transferor courts and that those courts under 1404 return the cases to him for trial.)

Chief Judge Alfred Covello, D. Connecticut

MDL–1180–In re Air Crash at Dubrovnik, Croatia, on 4/3/96 (involving Commerce Secretary Ron Brown) (On 4/10/98, because of *Lexecon* Judge Covello vacated his order previously transferring all cases to himself for trial even though all parties agreed to 1404 transfer.)

MDL–1210–In re SmithKline Beecham Clinical Laboratories, Inc., Laboratory Test Billing Practices Litigation (In light of *Lexecon,* Judge Covello vacated his previous order to show cause why all cases should not be transferred to himself for trial even though all parties appeared to have no objection to 1404 transfer.)

Judge Janis Jack, S.D. Texas

MDL–1206–In re Lease Oil Antitrust Litigation (Plaintiffs wanted to consent to trial in the transferee district, although Judge Jack cannot so order under *Lexecon)*

Judge Charles Brieant, S.D. New York

MDL–1222–In re Oxford Health Plans, Inc., Securities Litigation (Judge Brieant expects all parties to agree on transfer for trial, although Judge Breant cannot so order under *Lexecon.)*

Judge Claudia Wilken, N.O. California

MDL–1226—In re Sodium Gluconate Antitrust Litigation (All parties want Judge Wilken to keep the cases for trial, although she cannot so order under *Lexecon.)*

TRANSFEREE JUDGE UNABLE TO ORDER TRANSFER FOR TRIAL TO ANOTHER DISTRICT EVEN THOUGH ALL PARTIES REQUESTED IT.

Judge Earl 0 'Connor, D. Kansas (now pending before Judge Kathryn Vrafil)

MDL–1021—In re Independent Service Organizations Antitrust Litigation (The parties requested that the court transfer the litigation under 1404 to a district that was not the transferor district, although the court is prohibited from doing so by *Lexecon.)*

TRANSFEREE JUDGE'S ABILITY TO RESOLVE CASES HAS BEEN IMPAIRED BY *LEXECON*

Chief Judge Alfred Covello, D. Connecticut

MDL–946—In re Colonial Realty Limited Partnerships Litigation (Because of *Lexecon,* Judge Covello vacated his order previously transferring all cases to himself for trial.)

Judge Charles Kocoras, N.D. Illinois

MDL–997—In re Brand Name Prescription Drugs Antitrust Litigation (Judge Kocaras had to make sure class case set for trial on 9/14/98 met the jurisdictional requirements of *Lexecon.* Many cases will have to be returned to transferor courts.)

Chief Judge Paul Magnuson, D. Minnesota

MDL–1001—In re TMJ Implant Products Liability Litigation (If cases are not resolved via Dow Coming bankruptcy settlement in E.D. Michigan, there will likely be requests for trial before him of cases that must be returned to their transferor districts.)

Judge Wiffiam Standish, W.D. Pennsylvania

MDL–1040—In re Air Crash Near Pittsburgh, Pennsylvania, on 9/8/94 (Some of the attorneys suggested that if, and when, cases are remanded to the transferor districts, the transferor courts might return those cases to him under 1404 for a bifurcated trial of the liability issues.)

Judge Ruben Castillo, N.D. Illinois

MDL–1070—In re Air Crash Disaster Near Roselawn, Indiana, on 10/ 31/94 (He declined to order 1404 self-transfer for trial, in anticipation of *Lexecon.)*

Judge Martin Feldman, ED. Louisiana

MDL–1098—In re Masonite Corp. Hardboard Siding Products Liability Litigation (Judge Feldman thinks that settlement of these actions is possible, but doesn't know if *Lexecon* will prevent him from keeping cases long enough to do so.)

Judge Edmund Ludwig, E.D. Pennsylvania

MDL–1148—In re Latex Gloves Product Liability Litigation (Plaintiffs' lead counsel endorses trial in the MDL transferee district, although transferor courts would have to use 1404 to return 1407 remanded cases to the NOL transferee district for trial.)

Judge John Sprizzo, S.D. New York

MDL–1153—In re Bennett Funding Group, Inc., Securities Litigation (No. 11) *(Lexecon* will severely complicate the resolution of this litigation in which a number of state and federal law claims are pending and which, after *Lexecon,* will have to be returned tomultitude of courts for trial.)

PARTIES AND TRANSFEREE JUDGES WASTED TIME AND MONEY THROUGH COURT PROCEEDING SPAWNED BY *LEXECON* ROADBLOCK TO RESOLVE PARTIES' CONFLICT,

Judge John Sprizzo, S.D, New York

MDL–724—In re Highjacking of Pan American World Airways, Inc., Aircraft a Karachi International Airport, Pakistan, on 9/5/86 (Second Circuit held that *Lexecon* should not be applied retroactively, at least where, as in this litigation,

trial had been completed and final judgment entered prior to the Lerecon decision. See Shah, et al. v. Pa American World Services, re-, et al., 148 F.3d 84, 1998 VVT 310498 (2d Cir. June 15 1998).)

Judge Peter Beer, M.D. Florida, sitting by designation from E.D. Louisiana

MDL–940—In re Carbon Dioxide Industry Antitrust Litigation (In June 1998, the Supreme Court vacated a jury verdict for defendants that had been affirmed by the Eleventh Circuit in the two non-settling cases that Judge Beer had transferred to himself for trial.)

Chief Judge Edward Cohn, E.D. Pennsylvania (now pending before Judge Bruce Kauffman)

MDL–969—In re Unisys Corp. Retiree Medical Benefits ERISA Litigation (The *Lexecon* problem has been discussed in court proceedings.)

Chief Judge Frederick Motz, D. Maryland

MDL–1069—In re America Honda Motor Co., Inc., Dealerships Relations Litigation (To avoid delaying a class action trial on liability issues scheduled for January 1999, Judge Matz sought and received in June and July of 1998, respectively, i) an intercircuit assignment to sit in E.D. California, so that he could continue to rule on pretrial matters; and ii) a Panel order conditionally remanding a case to E.D. California, so that the presiding California judge could rule on a motion to transfer the action under 1404 to the D. Maryland for trial. The parties to this case subsequently reached a settlement, pending the court's approval.)

Judge Jerome Simandle, D. New Jersey

MDL–1112—In re Ford Motor Co. Ignition Switch Products Liability Litigation (Plaintiffs' counsel divided—some wanted remand to state courts, others wanted to wait and see what happens with bellwether trial and consent To change of venue even though Laxecon does not permit Judge Simandle to so order—Defense counsel were critical of *Lexecon* and would like to see the statute changed.)

Judge Alfred Lechner, ED. Pennsylvania (after to Judge William G-Bassler)

MDL–1188—In re Mid-American Waste, Inc., Securities Litigation (Counsel discussed with the court whether Trial could remain in transferee district, although the MDL transferee judge cannot so order under *Lexecon.)*

Chief Judge Donald Ziegler, W.D. Pennsylvania

MDL–1200—In re Flat Glass Antitrust Litigation (Lexecon problem has been discussed by the parties during court proceedings.)

Judge Philip Pro, D. Nevada

MDL–1201—In re Delgratia Mining Corp. Securities Litigation (At initial status conference, he directed counsel to give preliminary consideration to impact of *Lexecon.)*

Judge Paul Rosenblatt, D. Arizona

MDL–1202—In re Pillar Point Partners Antitrust & Patent Litigation (The court and counsel discussed the Lexecon problem at initial pretrial conference,)

Mr. COBLE. Again, I thank the witnesses from both panels for your testimony. The subcommittee appreciates this contribution.

This concludes the legislative hearing on H.R. 752, the Federal Courts Improvement Act of 1999; and H.R. 2112, the Multiparty, Multiforum Jurisdiction Act of 1999. The record will remain open for 1 week. Thank you again, and the subcommittee stands adjourned.

[Whereupon, at 3:23 p.m., the subcommittee was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE HEARING RECORD

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY.
Washington, DC, June 16, 1999.

Hon. HOWARD COBLE, *Chairman,*
Subcommittee on Courts and Intellectual Property.

DEAR MR. CHAIRMAN: This letter presents the views of the Department of Justice on H.R. 1752, the "Federal Courts Improvement Act of 1999." While the Department supports some of the provisions of H.R. 1752, the Department has serious reservations about a number of others and recommends that the latter provisions, described below, be eliminated from the bill.

SECTION 101: FINAL JUDGMENTS BY BANKRUPTCY JUDGES IN NON-CORE CASES

The Department continues to oppose section 101, as it did in similar legislation in the 105th Congress. Section 101 would allow a bankruptcy judge to enter the final judgment in a "non-core" bankruptcy case where a party failed to object timely (and, thus, is "deemed to consent") to the bankruptcy judge's proposed findings of fact and conclusions of law.

Current law requires an article III district court to enter the final judgment in a non-core case after "considering" a bankruptcy judge's proposed findings of fact and conclusions of law and after "reviewing *de novo*" a party's timely objections. 28 U.S.C. § 157(c)(1). The Congress crafted the current law in 1984 to cure the constitutional defects found by the Supreme Court in *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982). There, the Supreme Court struck down the bankruptcy court system created by the 1978 Bankruptcy Reform Act because it unconstitutionally conferred too much of the article III judicial power of the United States upon a non-article III officer. A key feature of Congress' curative legislation was the bifurcation of bankruptcy jurisdiction into two categories: 1) traditional bankruptcy matters, known as "core" cases; and 2) those cases on the periphery of bankruptcy jurisdiction, designated as "non-core." Responding to *Marathon*, Congress required special review of bankruptcy judges' "non-core" decisions by the article III district court. The special treatment for non-core cases is designed to ensure that the district courts exercise the "essential attributes of judicial power" in such cases. *Id.* at 81–88. *See also United State* v. *Raddatz*, 447 U.S. 667, 682 (1980) (magistrates can constitutionally decide the admissibility of a confession in a criminal case because the authority and responsibility for making a final decision remains with the article III judge).

By tampering with this feature of the 1984 curative legislation, section 101 threatens to upset the delicate balance struck by Congress in the 1984 amendments. In the Department of Justice's defense of the current bankruptcy court system against article III-based challenges, it stresses that the bankruptcy judge is an adjunct of the article III district court, especially in non-core cases. Proposed section 101 could hinder our arguments in defending the constitutionality of the current scheme if that scheme were seen as diluting the article III court's authority to enter the final decision. The Supreme Court has yet to uphold the existing system. In view of the dislocation and hardships that would result if the system were once again found unconstitutional, the limited administrative gains sought through the proposed change are not worth the incremental risks that the change would entail.

SECTION 201: REIMBURSEMENT OF JUDICIARY FOR CIVIL ANDCRIMINAL FORFEITURE EXPENSES

This provision mirrors a provision contained in legislation offered in the 104th and 105th Congresses which the Department opposed. Although payment of appropriate costs for indigent defense is fundamental to proper operation of the justice system, we do not believe that this provision is an appropriate mechanism and we continue to oppose it strongly.

Section 201 would require an annual transfer from the Justice and Treasury Asset Forfeiture Funds to the Judiciary of an amount stated by the Administrative office of the United States Courts to be the costs to the Judicial branch of processing civil and criminal forfeiture cases, not to exceed the lesser of $50,000,000 or 10% of deposits into the Funds. This transfer would be to cover the costs of adjudicating civil and criminal forfeiture cases, the costs of providing counsel to indigent defendants in such cases, and certain other costs that are the responsibility of the Judiciary. Proposed 28 U.S.C. § 524(c)(12)(A). These funds would be transferred into a special operating account to offset operating appropriations for the Judicial branch. *See* 28 U.S.C. § 1931.

We have serious reservations about the possibility that the Judicial branch may obtain a pecuniary benefit from judicial decisions forfeiting assets or funds to the United States. The judicial function, unique among governmental functions, should not have even the appearance of taint from a conflict of interest, that is, the possible appearance that the transfer of forfeited funds into the accounts of the Judicial branch could have influenced the judicial decision about the propriety of the forfeiture. *Cf. Ward* v. *City of Monroeville,* 409 U.S. 57 (1972) (pecuniary interest in outcome violates due process).

Section 201 also provides for the recovery of costs for probationary supervision of defendants under home detention or other forms of detainment outside of Bureau of Prison facilities. These costs are unrelated to forfeiture and should be funded through the normal appropriations process.

Additionally, section 201 does not seem to reflect that funds which may have been deposited into the asset forfeiture funds do not necessarily constitute "cash" available for transfer to the courts. First, deposited value may be subject to other legal constraints and assets may have to be sold to create a liquid amount for any transfer. Moreover, funds deposited or other asset forfeitures may be paid to lien holders, victims of the crime committed by the defendant, or others with superior rights.

Finally, section 201 does not take into account the reality that forfeiture actions are usually just one part of an overall prosecution. The forfeiture counts are often tried at the same time as the substantive counts. Separating out the costs associated with the forfeiture counts could well be impossible.

For all of these reasons, the Department recommends that this section be deleted from the bill.

SECTION 204: BANKRUPTCY FEES

Section 204 would allow bankruptcy administrators in certain states that are not part of a United States Trustee region (*i.e.,* North Carolina and Alabama) to place the quarterly fees they collect in Chapter 11 bankruptcies fees into a fund that can theoretically be used by the entire judiciary. In Trustee regions, by contrast, quarterly fees are placed in a separate US Trustee System fund, 28 U.S.C. § 589a, which may be used only for the operations of the United States Trustees. By not including a similar restriction on the use of bankruptcy fees in non-Trustee regions, section 204 could place judges in the awkward position of deciding fee disputes that could impact directly on the funding of their own operations. Thus, like section 201, section 204 raises the possibility that the Judicial branch may obtain a pecuniary benefit from its own acts. We therefore have similar, serious reservations about section 204.

SECTION 211: FEE AUTHORITY FOR TECHNOLOGY RESOURCES IN THE COURTS

Section 211 would add a new section 614 to Chapter 41 of Title 28 authorizing the Judicial Conference to prescribe new fees "for use of information technology resources provided by the judiciary." The Administrative office of the U.S. Courts is currently engaged in a nine-court pilot study of electronic case filing, and it is expected that electronic filing may become mandatory nationwide in the next few years. If that occurs and fees are imposed on United States government agencies for electronically filing documents, the costs could be prohibitive. We therefore oppose this provision in its current form, although Section 211 could be amended to provide an exemption from such fees for services rendered on behalf of the United

States. (Such an amendment might be modeled after the language in the Judicial Conference Schedule of Fees prescribed under 28 U.S.C. 1930, which provides, in pertinent part, "No fees are to be charged for services rendered on behalf of the United States. . .")

SECTION 301: REMOVAL OF CASES UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

Section 301 mirrors provisions contained in legislation introduced in the 104th and 105th Congress that the Department supported. We agree with section 301's provision that cases arising under ERISA need not always be removed to Federal court. Indeed, most such cases can be speedily and fairly tried in State court. This simple provision should end removal of many simple benefit claims from State court to the Federal court merely because they arise under ERISA.

SECTION 302: ELIMINATION OF IN-STATE PLAINTIFF DIVERSITY JURISDICTION

Section 302 of the bill would eliminate diversity jurisdiction where the plaintiff attempts to file a lawsuit in any federal court in the plaintiff's home state. Because it is likely that few plaintiffs will travel outside their home state to file a federal lawsuit, section 302 will require many plaintiffs to file in state court instead of federal court, even though the claims would satisfy current diversity requirements. The elimination of jurisdiction is one-way, however, because section 302 explicitly reserves the defendant's right to remove such a case to federal court.

The Department does not believe that this dramatic change to diversity jurisdiction should be enacted without extensive study and an opportunity for all interested parties to comment. Accordingly, we recommend that this provision be eliminated from the bill.

SECTION 304: BANKRUPTCY ADMINISTRATOR AUTHORITY TO APPOINTTRUSTEES, EXAMINERS AND COMMITTEE OF CREDITORS

Section 304 would, in those districts where the United States Trustee program does not apply (*i.e.*, Alabama and North Carolina), shift the responsibility for appointing standing trustees from bankruptcy judges to bankruptcy administrators. This shift of responsibility from judges to administrators is ostensibly designed to reduce the perception of abuse and cronyism that arises when one judicial officer appoints another. Indeed, it was this concern that prompted Congress, in 1986, to create the United States Trustee program, which now applies in most states and which transferred the power to appoint trustees from judges to the Justice Department. Because bankruptcy administrators are not independent of judges, however, section 304 would not prevent one judicial officer from appointing another in those states not under the Trustees program. The Department therefore has reservations about the efficacy of this provision. Were this provision to be enacted, moreover, the references to standing trustee compensation in subsection (b) would need to be corrected: compensation for standing trustees is covered by 28 U.S.C. §586, not sections 1202 and 1302 of the bankruptcy code.

SECTION 305: MAGISTRATE JUDGE CONTEMPT AUTHORITY

Section 305 would amend the Federal Magistrates Act to vest magistrate judges with criminal contempt authority for contempt committed in the magistrate's presence and disobedience of the magistrate's orders in civil consent and misdemeanor cases. In civil consent and misdemeanor cases, it would provide to magistrate judges the civil contempt authority of the district court. We note that giving contempt power to non-article III judges raises some constitutional concerns.

Although this is an unsettled area of law, we believe that there is a possibility that a magistrate judge's exercise of contempt authority could be held unconstitutional as an exercise of authority that the Constitution reserves to article III judges. In upholding the constitutionality of the Federal Magistrate Act provision permitting magistrate judges to try civil cases with the consent of the parties and enter judgment with respect to them, a Federal appellate court found it significant that magistrate judges had *not* been given contempt authority under the Magistrates Act. *Geras* v. *Lafayette Display Fixtures. Inc.,* 742 F.2d 1037, 1044 (7th Cir. 1984). The court noted that the Act, in placing the criminal contempt power "exclusively in the hands of article III judicial officers would seem, for present purposes at least, to provide an adequate distinction between such judges and non-article III officers." *Id.* The court added that "[t1his clear line also serves to limit the ultimate exercise of judicial power to persons enjoying the constitutional guarantee of independence." *Id. Accord pimha* v. *Ward,* 100 F.3d 653, 657 (9th Cir. 1996) ("The power to hold

persons in criminal contempt is not only awesome, but is also an inherent power of article III judges.") *cert. den.* 117 S.Ct. 1473 (1997).

These same constitutional concerns are also raised by existing statutory provisions conferring contempt authority on the Court of Veterans Appeals (38 U.S.C. §7265 (1994)) and the Tax Court (26 U.S.C. §7456(c) (1994)). *See, e.g., In re Hipp, Inc,* 895 F.2d 1503, 1513 & n.20 (5th Cir. 1990) (expressing doubt as to the constitutionality of the Tax Court's criminal contempt power); *In re Cox Cotton Co.,* 24 B.R. 930, 947-52 (E.D. Ark. 1982) (same), *vacated on other grounds sub nom. Lindsey* v. *Ipock,* 732 F.2d 619 (8th Cir.), *cert. denied sub nom., Cryts* v. *French,* 469 U.S. 881 (1984). *But of. Freytag* v. *CIR,* 501 U.S. 868, 891 (1991) (citing the article I Tax Court's "authority to punish contempts by fine and imprisonment, 26 U.S.C. §7456(c)" as partial support for statement that the "Tax Court's function and role in the federal judicial scheme closely resembles those of the federal district courts"). The courts have divided on the statutory and constitutional questions that arise when bankruptcy judges attempt to impose sanctions for civil and criminal contempt. The weight of authority holds that bankruptcy courts possess statutory or inherent power to impose sanctions for civil contempt[1] but that they lack such authority to punish criminal[2] contempt.

SECTION 310: MULTIDISTRICT LITIGATION

Section 310 would amend 28 U.S.C. §1407, the multi-district litigation statute. As currently drafted, the statute provides that the Multi-District Litigation Panel may assign cases involving common issues of fact to a single judge for consolidated pretrial proceedings. Section 310 amends the statute to extend the period of consolidation beyond the pretrial stage. As amended, the judge to whom the case was transferred for pre-trial proceedings has the option of consolidating the cases for trial as well—and also has the authority to decide where the consolidated trial should be held, guided by "the interest of justice,, and "the convenience of the parties and witnesses."

This provision would effectively overrule *Lexcon, Inc.* v. *Millberg Weiss Berghad Lynes & Lerach,* 523 U.S. 26 (1998). Our experience is that transferee courts are often the most efficient forum for resolving transferred cases when the consolidated and coordinated pre-trial proceedings are completed. District courts acting as transferee forums gain substantial expertise in the frequently complex and arcane issues that multi-district litigation proceedings entail. It would serve the interests of efficiency and predictability to permit transferee district courts to exercise broad discretion in determining whether they should retain these cases for trial or transfer them to other courts. We therefore favor enactment of section 310.

SECTION 405: JUDGES' FIREARMS TRAINING

This provision authorizing judges to carry firearms in certain situations reflects an approach to this issue agreeable to the Department, based on discussions with the Judicial Conference. The Department supports section 405 as introduced.

SECTIONS 501 AND 502: MAXIMUM AMOUNTS FOR COMPENSATION

These provisions would provide for an increase in the level of compensation of appointed counsel under the Criminal Justice Act. The Attorney General generally supports increases in the quality of, and funding for, indigent defense representation. To the extent the Administrative office believes that these increases are necessary to assure adequate representation, the Department would concur with its judgment.

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[1] *Compare, e.g., Placid Refining Co.* v. *Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.),* 108 F.3d 609, 613 (5th Cir. 1997); *and Mountain America Credit Union* v. *Skinner (In re Skinner),* 917 F.2d 444, 447, 449–50 (10th Cir. 1990); *with Plastiras* v. *Idell (In re Sequoia Auto Brokers Ltd.),* 827 F.2d 1281 (9th Cir. 1987) (power to adjudicate " civil contempt cannot be inferred from 11 U.S.C. §§105 and 157).

[2] *Compare, e.g., Griffith* v. *Oles (In re Hipp, Inc.),* 895 F.2d 1503, 1513 & n.20, 1518 (5th Cir. 1990) (finding that section 105(a) does not confer authority to impose criminal Punishment for contemptuous acts not committed in or near the presence of a bankruptcy judge, and noting that "the constitutionality of the contrary position is subject to substantial question"); *and In re Sequoia Auto Brokers. Ltd.,* 827 F.2d at 1289 (same effect); *with Raaar* v. *Ramsav,* 3 F.3d 1174, 1177–1179 (8 Cir. 1993) (section 105 of the bankruptcy statute and the Constitution permit bankruptcy courts "to go at least [as] far" as to enter a contempt order that, by its terms, ' allows the contemnor to obtain de novo district court review before the order takes effect).

SECTION 503: TORT CLAIMS ACT AMENDMENTS RELATING TO LIABILITY OF FEDERAL PUBLIC DEFENDERS

Section 503 would amend 28 U.S.C. §2671 to exclude federal public defenders performing professional services in the course of providing representation from the purview of the Federal Tort Claims Act ("FTCA"). Because federal public defenders usually oppose Justice Department attorneys in court, and Justice Department attorney's defend FTCA lawsuits, public defenders are not desirous of sharing the rationales for their actions with the Justice Department. Therefore, it makes sense to remove public defenders from the ambit of the FTCA. The Department accordingly supports this provision.

Thank you for this opportunity to present our views. The office of Management and Budget has advised us that from the standpoint of the Administration's program, there is no objection to submission of this letter. Please do not hesitate to call upon us if we may be of further assistance.

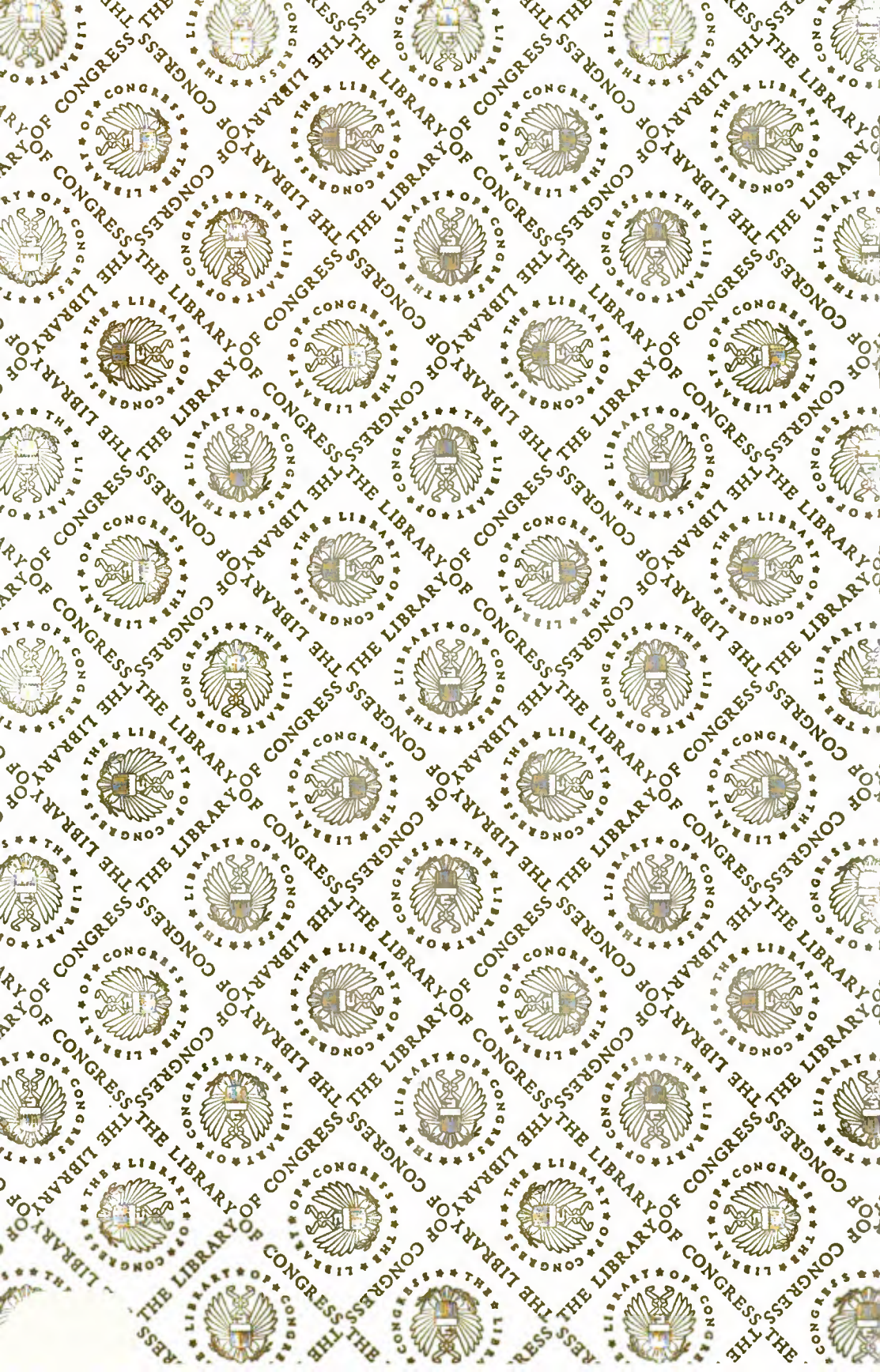
Sincerely,

JON P. JENNINGS, *Acting Assistant Attorney General.*

CC: Honorable Howard L. Berman
Ranking Minority Member

62-501 (96)

ISBN 0-16-060484-2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